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No. 04 640 NOV - 9 2004

In The
Supreme Court of the United States

1690 COBB L.L.C. d/b/a WATERPIPE WORLD,
and ERIK CLABAUGH

and

INSERECTION, A FANTASY STORE, and ERIK CLABAUGH,

Petitioners,

v.

THE CITY OF MARIETTA, BILL DUNAWAY, In his official capacity as Mayor of THE CITY OF MARIETTA, BETTY L. HUNTER, PETE WALDREP, JOHNNY SINCLAIR, ANDY MORRIS, ANTHONY COLEMAN, JIM KING, And PHILIP GOLDSTEIN, In their official capacity as Members of THE MARIETTA CITY COUNCIL

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the State of Georgia's ban on the dissemination of sexual devices to adults violate petitioners' substantive due process rights as guaranteed by the Fourteenth Amendment of the United States Constitution and this Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 156 L. Ed. 2d 508 (2003)?

2. Does the City of Marietta's revocation of petitioners' business licenses because of petitioners' past sale of sexual devices to adults violate petitioners' rights to continue to disseminate non-obscene expressive works protected by the First and Fourteenth Amendments to the United States Constitution?

PARTIES TO THE PROCEEDING

1690 COBB L.L.C. d/b/a WATERPIPE WORLD,

ERIK CLABAUGH,

INSERECTION, A FANTASY STORE,

Petitioners.

THE CITY OF MARIETTA,

BILL DUNAWAY, in his official capacity as Mayor of the CITY OF MARIETTA,

BETTY L. HUNTER,

PETE WALDREP,

JOHNNY SINCLAIR,

ANDY MORRIS,

ANTHONY COLEMAN,

JIM KING, And

PHILIP GOLDSTEIN,

In their official capacities as Members of the MARIETTA CITY COUNCIL

Respondents.

PARENT AND SUBSIDIARY COMPANIES

The parent corporation of 1690 Cobb L.L.C. d/b/a Waterpipe World is Midtown Visuals, Inc., a Georgia corporation. Inserection does not have a parent corporation.

Erik Clabaugh is an individual.

No publicly held company owns ten percent (10%) or more of the stock of either petitioner.

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OPINIONS AND ORDERS BELOW

The opinions and orders below have not, to petitioners' knowledge, been published in any official or unofficial reporters.

JURISDICTION OF THIS COURT

The order of the Superior Court of Cobb County, Georgia, affirming the Marietta City Council's revocation of petitioners' business licenses was issued on May 12, 2004. The Georgia Court of Appeals denied review by order dated July 7, 2004. The Georgia Supreme Court denied petitioners' requested writ of certiorari by order dated October 25, 2004.

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1257 and Rules 10(c) and 13 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

O.C.G.A. § 16-12-80:

> (a) A person commits the offense of distributing obscene material when he sells, lends, rents, leases, gives, advertises, publishes, exhibits, or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used in this Code section, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material; provided, however, that the character and reputation of the individual charged with an offense under this law, and, if a commercial dissemination of obscene material is involved, the character and

reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates, and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) To the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion;
(2) The material taken as a whole lacks serious literary, artistic, political, or scientific value; and
(3) The material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (A) through (E) of this paragraph:
(A) Acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;
(B) Acts of masturbation;
(C) Acts involving excretory functions or lewd exhibition of the genitals;
(D) Acts of bestiality or the fondling of sex organs of animals; or
(E) Sexual acts of flagellation, torture, or other violence indicating a sadomasochistic sexual relationship.

(c) Any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this Code section.

(d) Material not otherwise obscene may be obscene under this Code section if the distribution thereof, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(e) It is an affirmative defense under this Code section that dissemination of the material was restricted to:
(1) A person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or
(2) A person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.
(f) A person who commits the offense of distributing obscene material shall be guilty of a misdemeanor of a high and aggravated nature.

STATEMENT OF THE CASE

Petitioners operate retail stores in the City of Marietta under licenses issued by the City permitting them to operate as general merchandise retail establishments with no more than twenty percent (20%) of their total retail floor space, revenue, and

stock in trade accorded to adult videos and other adult items defined in § 8-20-020 of the City Code (see petitioners' licenses at Appendix ["A"] 69-70, 78-79). The City barred petitioners from offering sexual devices for sale or display in their premises (A 69-70, 78-79).

On June 6, 2003, Scott Everingham, City of Marietta Business License Manager, sent a letter to each store warning them to halt the sale of items prohibited by O.C.G.A. § 16-12-80 to avoid revocation or suspension of their licenses. On June 13, 2003, Mr. Everingham caused a letter to be hand-delivered to each petitioner's store advising that Mr. Everingham would conduct a hearing on June 18, 2003, to determine whether the store's business license would be suspended or revoked. As to each store, the entire notification of the charges set forth only:

> "The basis for the hearing on whether to suspend or revoke the above license is set forth in Marietta City Code Section 8-4-405(5) (3) which provides as follows: 'An applicant has knowingly allowed the violation of an ordinance of the city or a violation of any criminal law of the State of Georgia (a misdemeanor or a felony) to occur on the premises; and that such violation is materially related to the operation of said business.'"

(A 35, 54).

After conducting the hearing, Mr. Everingham issued a letter to each petitioner on June 23, 2003,

ordering revocation of its business license as of that date, subject to appeal of said revocations. In pertinent part, Mr. Everingham found that petitioners had sold sexual devices prohibited by the City and by the State of Georgia, in violation of the license conditions (A 36-40, 55-58). On July 1, 2003, petitioners filed notices of appeal with the Mayor and the Council, as set out in Marietta Code § 8-4-405.

On August 13, 2003, petitioners appeared before the Marietta City Council, which heard the appeal and voted to uphold the ordered revocations. The Council ruled orally that the revocations would take effect on August 15, 2003. No written ruling from the Council was ever sent to either of the petitioners.

On August 15, 2003, petitioners filed petitions for a writ of mandamus and a writ of certiorari with the Superior Court of Cobb County (A 24-33, 43-52). The Superior Court issued an order on January 29, 2004, setting a special hearing on these cases for March 18, 2004. At that hearing, the court heard oral arguments on the petitions and on the City's motion to dismiss based on mootness.

On May 12, 2004, the Superior Court affirmed the Marietta City Council's license revocations and denied the petitions. Despite ruling on the merits of the petitions, and rejecting the petitioners' contentions that they had a substantive due process right to disseminate sexual devices to consenting adults, the Superior Court also granted the City of Marietta's motion to dismiss based on the expiration of the time period of the business licenses (A 3-11, 13-21).

The petitioners thereafter sought discretionary review of the Superior Court's order. The Georgia Court of Appeals denied their applications by order dated July 7, 2004 (A 2). The petitioners' request for certiorari to the Court of Appeals from the Georgia Supreme Court was denied by an order of that court dated October 25, 2004, and served by mail to petitioners on Wednesday, October 27, 2004 (A 1). The City's letter serving petitioners with the Georgia Supreme Court's order also states: "The purpose of this letter is to give your clients until 9:00 a.m. on Monday, November 1, 2004 to cease all operations within the City of Marietta" (A 22-23).

The petitioners are currently continuing to do business under this threat of impending closure by the City. Petitioners have applied to the Honorable Justice Anthony M. Kennedy for a stay pursuant to 28 U.S.C. § 2101(f) and Rule 23 of the Rules of this Court, seeking equitable intervention by the Court for the purpose of allowing petitioners sufficient time to file this petition for a writ of certiorari and to obtain the Court's decision thereon.

REASONS FOR GRANTING WRIT

POINT I

The Due Process Clause Guarantees the Petitioners the Right to Offer Sexual Devices for Sale to Adults

A. Introduction

The logical application of the Court's ruling in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), renders unconstitutional the State of Georgia's prohibition of the dissemination of sexual devices to adults on the ground that such devices are obscene *per se*. O.C.G.A. § 16-12-80(c). Such a law, predicated on conceptions of public morality enforced by the State through the criminal code, derogates the privacy protections recognized by *Lawrence* to follow from the Due Process Clause.

Georgia, and a handful of other states (seven, by petitioners' count) explicitly ban the sale or dissemination of sexual devices. Some state courts have recognized a federal right of privacy arising from the Due Process Clause of the Fourteenth Amendment that protects an individual's right to obtain sexual devices for *bona fide* medical and psychological therapeutic needs. *See, e.g., State v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990); *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colorado 1985). Others, like the Supreme Court of Louisiana, have recognized an individual's right to possess sexual devices in the privacy of her home, but not a corresponding right to promote or sell such devices.

State v. Brenan, 772 So.2d 64 (20001); *see also, State v. Yorko*, 690 S.W.2d 260 (Tex. Crim. App. 1985).

Petitioners contend that, in light of this Court's decision in *Lawrence,* individuals have a substantive due process right to obtain and use sexual devices in private, and that this right is not predicated on a medical or psychological therapeutic need. Further, petitioners maintain that the Fourteenth Amendment protects their rights to sell or otherwise disseminate sexual devices to adults for use in private. Since these are important questions of federal law that concern the Georgia courts' refusal to recognize petitioners' substantive due process rights under both the Fourteenth Amendment and this Court's decision in *Lawrence v. Texas, supra,* the requested writ of certiorari should issue to allow petitioners a full and fair opportunity to vindicate their federal constitutional rights.

In affirming the City of Marietta's revocation of the petitioners' business licenses, the Superior Court of Cobb County specifically found that the license revocations were justified because "[t]he sex toys and other evidence in this case constitute an obscenity under O.C.G.A. § 16-12-80 (c) and [ ] the sale of such items is unlawful under O.C.G.A. § 16-12-80 (A 10, 20). These decisions, allowed to stand by both the Georgia Court of Appeals and the Georgia Supreme Court, deprive the petitioners of their rights to due process of law. Moreover, the threatened closure of petitioners' retail stores because of past sales of purportedly *per se* obscene sexual devices will work an unavoidable First

Amendment injury by suppressing the petitioners' lawful dissemination of other non-obscene materials.

B. The Due Process Clause Guarantees Petitioners' Rights to Disseminate Sexual Devices to Adults

The Court recently reaffirmed that individual liberty interests are, in certain important respects, shielded from State interference, particularly where privacy concerns are implicated. As Justice Kennedy, writing for the Court, observed in *Lawrence*:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.

Lawrence v. Texas, 539 U.S. at 562, 123 S. Ct. 2472. In keeping with the constitutional tradition noted by the *Lawrence* Court, petitioners respectfully submit that the purchase and private use of sexual devices by adults is a sphere of an American citizen's life "where the State should not be a dominant presence," *Id,* and autonomy of self should control. The State of Georgia should not be permitted to enforce a moral code that interferes with the dissemination of devices that are used by

consenting adults during lawful private sexual conduct.

Rejecting the constitutionality of the State of Texas' law criminalizing consensual sodomy between individuals of the same sex, five Justices of this Court in *Lawrence* construed the Due Process Clause of the Fourteenth Amendment to provide substantive protection to private sexual choices made by adult citizens:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. **Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.** "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its

> intrusion into the personal and private life of the individual.

Lawrence v. Texas, 539 U.S. at 578, 123 S. Ct. 2472 (citation omitted; emphasis added).

Expressly overruling *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), the *Lawrence* Court recognized both the liberalization of American society's attitude toward the private sexual choices of its citizens, as well as the judicial extension of constitutional due process protections to those choices. From the rights to privacy acknowledged in *Griswold v. Connecticut*, 381 U.S. 479, 855 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (invalidating a state law prohibiting the use of contraceptive drugs and devices), and *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"), to *Planned Parenthood of Southern Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (reaffirming *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), in part, on the due process protections of the Fourteenth Amendment), the *Lawrence* Court tracked the expansion of personal privacy rights recognized by the Supreme Court.

The *Lawrence* Court also noted that the recognition of personal privacy rights with respect to sexual choices may conflict with ethical, moral, and religious beliefs, but warned that the State may not use

the criminal law to enforce those beliefs on the society as a whole. In doing so, the Court emphasized that Justice Steven's dissenting opinion in *Bowers* controlled in *Lawrence*:

> "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."

Lawrence v. Texas, 539 U.S. at 577-78, 123 S. Ct. 2472, *quoting Bowers v. Hardwick*, 478 U.S. at 216, 106 S. Ct. 2841 (Stevens, J., dissenting; footnotes and citations omitted).

Thus, *Lawrence* logically must be construed to ensure protection of an adult's substantive due process right to make personal choices concerning the purchase and enjoyment of sexual devices. Indeed, Justice Antonin Scalia declared as much in his dissent in *Lawrence*, where he observed that the Court's adoption of Justice Steven's dissent in *Bowers* with respect to *not*

criminalizing certain personal sexual choices would effectively obliterate Government regulation of private sexual conduct on the basis of moral conceptions, including obscenity:

> This effectively decrees the end to all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational basis review.

Id. at 599, 123 S. Ct. 2472.

Whether Justice Scalia's prediction concerning to the effect of *Lawrence* on obscenity laws is that pronounced of a departure from current law is debatable. This Court long ago ruled that, under the First and Fourteenth Amendments, the Government may not "tell [ ] a man, sitting alone in his own house, what books he may read or what films he may watch" even if such works are obscene as a matter of law. *Stanley v. Georgia*, 394 U.S. 557, 559, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969). Continuing to prohibit *public* use of sexual devices in a lewd manner, but allowing the purchase of sexual devices for personal use by adults would hardly be a shocking or unreasonable advancement of personal privacy rights in the wake of *Lawrence*.

Moreover, the Court's consideration of the petitioners' constitutional objections is particularly important and necessary in light of the Eleventh Circuit's recent decision in *Williams v. Attorney General*

of Alabama, 378 F.3d 1232 (July 28, 2004). There, the majority of the Circuit Court held that consenting adults do not have a substantive due process right to engage in private intimate sexual conduct. *Id.* at 1250. Petitioners submit that the *Williams* decision cannot be reconciled with this Court's decision in *Lawrence*.

The Eleventh Circuit's refusal to invalidate Alabama's law criminally proscribing the commercial sale of sexual devices was premised, in part, on the Circuit Court's view that *Lawrence* did not provide a foundation for recognition of a right of sexual privacy guaranteed by substantive due process. *Id.* at 1235-36. However, as Circuit Judge Barkett pointed out in her dissent, the majority's interpretation of *Lawrence* is, simply, wrong:

> The majority's decision rests on the erroneous foundation that there is no substantive due process right to adult consensual sexual intimacy in the home and erroneously assumes that the promotion of public morality provides a rational basis to criminally burden such private intimate activity. These premises directly conflict with the Supreme Court's holding in *Lawrence v. Texas*.

Id. at 1250 (citation omitted).

Accordingly, this Court's review of the petitioners' constitutional objections to Georgia's criminalization of the dissemination of sexual devices to consenting adults for use in their private sexual lives will also have the additional salutary effect of resolving

the Eleventh Circuit's misinterpretation of *Lawrence*. Petitioners submit that, as shown by this Court's thoughtful and cautious substantive due process analysis in *Lawrence*, an explicit recognition of their constitutional rights to sell sexual devices to adults for use in private is not so much an extension of *Lawrence* as it is inherent in the understanding that "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Lawrence v. Texas*, 539 U.S. at 562, 123 S. Ct. 2472. Consonant with the Court's warning in *Lawrence* that a State cannot burden private intimate activity in order to advance publicly imposed morality, Georgia's ban on the dissemination of sexual devices should be struck down.

POINT II

The City of Marietta Cannot Constitutionally Revoke Petitioners' Licenses and Demand That Petitioners Cease the Dissemination of Expressive Materials Protected by the First Amendment Because of Past Sales of Sexual Devices

Assuming, *arguendo*, that Georgia can lawfully proscribe the dissemination of sexual devices, the City of Marietta cannot constitutionally prohibit the petitioners from using their premises to display and sell books, magazines, and films that are protected by the First Amendment. Such a prohibition would constitute an unlawful prior restraint based on past, alleged criminal law violations unrelated to the content of the expression petitioners disseminate.

The use of past obscenity convictions to prevent the future operation of a business engaged in protected expression has been condemned by this Court as an unconstitutional prior restraint of free speech. For example, in *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d. 413 (1980), the Court struck down a Texas nuisance statute that authorized courts, "on the basis of a showing that obscene films have been exhibited in the past, to prohibit the future exhibition of motion pictures that have not yet been found to be obscene." *Id.* at 311, 100 S. Ct. 1156. *See also, Gayety Theaters v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983).

In the instant case, the City has revoked the petitioners' licenses to sell presumptively protected books, magazines, and films that have not even been challenged as obscene, much less determined in a court of law to be outside the ambit of First Amendment protection. This is a classic prior restraint of future lawful expression on the impermissible basis of past violations of law, and granting of the petitioners' request for a writ of certiorari is warranted to remedy this constitutional violation.

CONCLUSION

Petitioners respectfully submit that the Court should grant their petition for a writ of certiorari to the Supreme Court of Georgia so that they may have a full and fair opportunity to vindicate their rights under the First and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

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Re: Revoking Business License Number 03-49421,
With Attachment,
dated June 23, 2003 ..... 71a

Attachment:

City of Marietta Business License
Number 03-49421,
With Attachment,
dated 2003 ..... 75a

Attachment:

Conditions and Stipulations
Regarding License Issued by the
City of Marietta to DIME ONE LLC
dated March 13, 2003..... 77a

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: October 25, 2004

Douglas R. Haynie
HAYNIE, LITCHFIELD & CRANE, P.C.
222 Washington Avenue
Marietta GA 30060

Case No. S04C1906

STARSHIP ENTERPRISES OF ATLANTA, INC., d/b/a STARSHIP et al. v. CITY OF MARIETTA et al.

COURT OF APPEALS CASE NO. A04D039B

This Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

_____
_____
_____
_____

Sherie M. Welch, Clerk

Court of Appeals
of the State of Georgia

ATLANTA, JULY 07, 2004

The Court of Appeals hereby passes the following order:

APPLICATION NO. A04D0398

1690 COBB L.L.C. D/B/A WATERPIPE WORLD, ET AL V. CITY OF MARIETTA

Upon consideration of the Application for Discretionary Appeal, it is ordered that it be hereby DENIED.

96034

031617834

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta

JULY 07 2004

I certify that the above is a true extract fromd the minutes of the Court of Appeals of Georgia

Witness my signature and the seal of said court hereto affixed the day and year last above above written.

Clerk.

_____/s/_____

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

INSERECTION: A FANTASY STORE, AND DIME ONE, L.L.C., AND RALPH MEGGINSON, Petitioners, v. THE CITY OF MARIETTA, BILL DUNAWAY, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF MARIETTA BETTY L. HUNTER, PETE WALDREP, JOHNNY SINCLAIR, ANDY MORRIS, ANTHONY COLEMAN, JIM KING, AND PHILIP GOLDSTEIN, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE MARIETTA CITY COUNCIL, Defendants.	:	CIVIL ACTION FILE NO. 03-1-6179-34

[ENTERED: MAY 14, 2004]

ORDER AFFIRMING THE ACTION OF THE MARIETTA CITY COUNCIL REVOKING THE LICENSE OF PETITIONERS

The above-styled case is before this court based upon Plaintiffs' Petition for Writ of Mandamus and Writ of Certiorari. By order dated January 29, 2004, the court set a special hearing in this matter on March 18, 2004. At that time, the court heard oral argument on Plaintiffs' petition and also heard oral argument on Defendants' Motion to Dismiss based upon mootness.

In issuing this order, the court has reviewed the pleadings, motions and documents in the record. In addition, the court has reviewed each item of evidence submitted at the hearing before the Marietta City Council on August 13, 2003 which resulted in the revocation of the license by the Marietta City Council.

Based upon the above review, the court orders the following regarding Plaintiffs' petition and Defendants' Motion to Dismiss as follows:

FINDINGS OF FACT

While the court deems that findings of fact and conclusions of law are not required to resolve the instant matter, the court nevertheless enter same as follows:

1.

The Plaintiffs' applied for and received a license from the City of Marietta. By its terms, the license expired December 31, 2003. The purpose of the license was for general merchandise, retail. The license is contained in the record and has attached to it certain

stipulations and conditions which were signed and agreed to by Plaintiffs.

2.

Agents of the Marietta Police Department purchased certain adult items in Plaintiffs' store on May 21, 2003 and May 28, 2003. Said items were entered into evidence at the hearing before the Marietta City Council and the hearing before the court on March 18, 2004.

3.

By notice dated June 13, 2003, the Business License Manager for the City of Marietta notified Plaintiffs that a hearing would be held on June 18, 2003 on whether or not to suspend or revoke Plaintiffs' license. Following the hearing held by the Business License Manager for the City of Marietta on June 18, 2003, the Business License Manager revoked the license of the Plaintiffs' in this case by decision dated June 23, 2003. The license was revoked in its entirety through December 31, 2003. Thereafter, Plaintiffs appealed the decision of the Business License Manager and the hearing was held, following proper notice, before the Marietta City Council on August 13, 2003. At such hearing, Plaintiffs were represented by counsel and the City Solicitor presented the case to the City of Marietta.

4.

Following the hearing on August 13, 2003, the Marietta City Council unanimously revoked the license of the Plaintiffs' through December 31, 2003.

5.

Thereafter, on August 15, 2003, Plaintiffs instituted this action seeking review of the decision of the Marietta City Council.

STANDARD OF REVIEW

It is a well established principle of Georgia law that the appropriate standard of review to be applied to issues of fact on writ of certiorari to the superior court is whether the decision of the governmental body was supported by any evidence. Emory Univ. v. Levitas, 260 Ga. 894, 898(1), 401 S.E.2d 691 (1991); Goldwire v. Clark, 234 Ga. App. 579, 581(1), 507 S.E.2d 209 (1998); City of Atlanta Government v. Smith, 228 Ga. App. 840, 843(1), 482 S.E.2d 466 (1997); City of Atlanta v. Bankhead Enterprises, Inc. et al., 224 Ga. App. 840, 843(1), 482 S.E.2d 466 (1997). Further, the decision of the City Council may be reversed or modified only if it "acted beyond the discretionary powers conferred upon it, abused its discretion, or acted arbitrarily or capriciously with regard to an individual's rights." Strickland v. Douglas County, 246 Ga. 640, 642(1), 272 S.E.2d 340 (1980). "The clearly erroneous standard of review to be applied by the superior court prevents a de novo determination of evidentiary questions leaving only a determination of

whether the facts found by the [governmental body] are supported by any evidence." Commr. of Ins. v. Stryker, 218 Ga. App. 716, 717(1), 463 S.E.2d 163 (1995).

The standard of review of any evidence places the superior court judge in the role of an appellate court, allowed only to review the evidence and not to retry or to rehear the case. "The superior court judge cannot substitute his [or her] judgment for that of the [governmental body] as to the weight of the evidence on questions of fact." Levitas at 260 Ga. 898, 4001 S.E.2d 695. The superior court is "bound by the acts presented to the local governing body or administrative agency." Id. Even the Court of Appeals when reviewing the decision of the superior court pursuant to writ of certiorari must review whether the record supports the initial decision of the local governing body or administrative agency, not whether the record supports the superior court's decision. Id. See also Goldwire v. Clark, 234 Ga. App. 579, 581(1), 507 S.E.2d 209 (1998); City of Atlanta Government v. Smith, 228 Ga. App. 840, 843(1), 482 S.E.2d 466 (1997) .

On writ of certiorari, the superior court applies the any evidence rule and reviews the evidence in the case as though it is an appellate court, deciding whether the record supports the decision of the governmental body.

CONCLUSIONS OF LAW

6.

After reviewing the record in its entirety, including the physical evidence (the so-called "sex toys"), this court finds that there was sufficient and substantial evidence before the Marietta City Council contained in the record on August 13, 2003 to support its decision to revoke the license of the Plaintiffs' through December 31, 2003.

7.

The court further finds that the record in this case, including the sex toys, shows that the Plaintiffs violated the written conditions attached to the license issued by the City of Marietta to the Plaintiffs, thus providing sufficient grounds, based upon sufficient and substantial evidence, for the Marietta City Council to revoke the license issued to the Plaintiffs through December 31, 2003.

8.

The court rejects the challenges contained in the record by the Plaintiffs. In rejecting said challenges, the court notes that the Marietta City Council and the Business License Manager for City of Marietta followed the proper procedure required under the Marietta City Code and, gave sufficient notice to the Plaintiff regarding the hearing and the matters to be considered at the hearing, both before the Business License Manager and the City Council. The court further finds

that the city gave proper notice to the proper party and that the sentence imposed by the Marietta City Council was both supported by the evidence and was proper under the Marietta City Code. Further, the court rejects the constitutional challenges by the Plaintiff in the record and finds same to be without merit.

9.

The constitutional challenges raised by the Plaintiffs in this matter have been ruled adversely to the Plaintiffs by the appellate courts of Georgia in the following cases: Sewell v. State, 238 Ga. 495, 233 S.E.2d 187 (1977); Chamblee Visuals, LLC v. City of Chamblee, 270 Ga. 33, 506 S.E.2d 113 (1998); Powell v. State, 270 Ga. 327, 510 S.E.2d 18 (1998); Morrison v. State, 272 Ga. 129, 526 S.E.2d 336 (2000).

10.

The court further finds that the Mandamus portion of the appeal is not applicable here because the Plaintiffs' remedy in this case is certiorari, not mandamus.

11.

Having reviewed the evidence and the matters listed herein, the court finds:

a) The sex toys and other evidence in this case violate the written conditions of the license.

b) The sex toys and other evidence in this case violate the adult entertainment code of the City of Marietta as referenced in the license.

c) The sex toys and other evidence in this case constitute an obscenity under O.C.G.A. §16-12-80(c) and that the sale of such items in unlawful under O.C.G.A. §16-12-80.

RULING ON DEFENDANTS' MOTION TO DISMISS

While the above matters resolve this case, the court deems it appropriate to rule on the city's Motion to Dismiss. The city's Motion is based upon the fact that the license, on its face, expires on December 31, 2003, which is also the date through which the City Council revoked same. The city did not have authority to revoke the license beyond December 31, 2003 because there was, in fact, no license to revoke beyond such date. The court grants the city's Motion to Dismiss based upon the following: Cook v. Harris, 209 Ga. 425, 73 S.E.2d 89 (1952); Stover v. City Council of Fairburn, 220 Ga. 670, 141 S.E.2d 399 (1965); Exley v. Blackmon, 129 Ga. App. 598, 200 S.E.2d 334 (1973); Members of the Board of Commissioners of Whitfield County v. Golden Gallon, Inc., 244 Ga. 209, 259 S.E.2d 463 (1979).

CONCLUSION

For the reasons stated above, it is hereby ordered, adjudged and decreed that the Marietta City Council's decision to revoke the license of Plaintiff is

hereby affirmed in its entirety and the Plaintiffs' petition is hereby denied. In addition, the court grants the Motion to Dismiss filed by the City of Marietta in this case.

SO ORDERED, this 12 day of May, 2004.

_____/s/_____
Judge S. Lark Ingram
Cobb Superior Court
Cobb Judicial Circuit

CERTIFICATE OF SERVICE

This is to certify that I have this day mailed (through the United States Postal System) a copy of the foregoing document to the following, to wit:

Alan I. Begner, Esq.
Cory G. Begner, Esq.
Begner & Begner, P.C.
1280 West Peachtree Street
Suite 230
Atlanta, Georgia 30309

Douglas R. Haynie, Esq.
Haynie, Litchfield & Crane, P.C.
222 Washington Avenue
Marietta, Georgia 30060

This 13 day of May, 2004.

_____/s/_____
Debbie Smith, Judicial
Administrative Assistant to
Judge S. Lark Ingram

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

1690 COBB, L.L.C. d/b/a INSERECTION: WATERPIPE WORLD And ERIK CLABAUGH	:	
Petitioners,	:	CIVIL ACTION FILE NO. 03-1-6177-34
v.	:	
THE CITY OF MARIETTA, BILL DUNAWAY, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF MARIETTA BETTY L. HUNTER, PETE WALDREP, - JOHNNY SINCLAIR, ANDY MORRIS, ANTHONY COLEMAN, JIM KING, AND PHILIP GOLDSTEIN, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE MARIETTA CITY COUNCIL,	:	
Defendants.	:	

[ENTERED: MAY 12, 2004]

ORDER AFFIRMING THE ACTION OF THE MARIETTA CITY COUNCIL REVOKING THE LICENSE OF PETITIONERS

The above-styled case is before this court based upon Plaintiffs' Petition for Writ of Mandamus and Writ of Certiorari. By order dated January 29, 2004, the court set a special hearing in this matter on March 18, 2004. At that time, the court heard oral argument on Plaintiffs' petition and also heard oral argument on Defendants' Motion to Dismiss based upon mootness.

In issuing this order, the court has reviewed the pleadings, motions and documents in the record. In addition, the court has reviewed each item of evidence submitted at the hearing before the Marietta City Council on August 13, 2003 which resulted in the revocation of the license by the Marietta City Council.

Based upon the above review, the court orders the following regarding Plaintiffs' petition and Defendants' Motion to Dismiss as follows:

FINDINGS OF FACT

While the court deems that findings of fact and conclusions of law are not required to resolve the instant matter, the court nevertheless enter same as follows:

1.

The Plaintiffs' applied for and received a license from the City of Marietta. By its terms, the license expired December 31, 2003. The purpose of the license was for general merchandise, retail. The license is

contained in the record and has attached to it certain stipulations and conditions which were signed and agreed to by Plaintiffs.

2

Agents of the Marietta Police Department purchased certain adult items in Plaintiffs' store on May 21, 2003 and May 28, 2003. Said items were entered into evidence at the hearing before the Marietta City Council and the hearing before the court on March 18, 2004.

3.

By notice dated June 13, 2003, the Business License Manager for the City of Marietta notified Plaintiffs that a hearing would be held on June 18, 2003 on whether or not to suspend or revoke Plaintiffs' license. Following the hearing held by the Business License Manager for the City of Marietta on June 18, 2003, the Business License Manager revoked the license of the Plaintiffs' in this case by decision dated June 23, 2003. The license was revoked in its entirety through December 31, 2003. Thereafter, Plaintiffs appealed the decision of the Business License Manager and the hearing was held, following proper notice, before the Marietta City Council on August 13, 2003. At such hearing, Plaintiffs were represented by counsel and the City Solicitor presented the case to the City of Marietta.

4.

Following the hearing on August 13, 2003, the Marietta City Council unanimously revoked the license of the Plaintiffs' through December 31, 2003.

5.

Thereafter, on August 15, 2003, Plaintiffs instituted this action seeking review of the decision of the Marietta City Council.

STANDARD OF REVIEW

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[governmental body] are supported by any evidence." Commr. of Ins. v. Stryker, 218 Ga. App. 716, 717(1), 463 S.E.2d 163 (1995).

The standard of review of any evidence places the superior court judge in the role of an appellate court, allowed only to review the evidence and not to retry or to rehear the case. "The superior court judge cannot substitute his [or her] judgment for that of the [governmental body] as to the weight of the evidence on questions of fact." Levitas at 260 Ga. 898, 4001 S.E.2d 695. The superior court is "bound by the acts presented to the local governing body or administrative agency." Id. Even the Court of Appeals when reviewing the decision of the superior court pursuant to writ of certiorari must review whether the record supports the initial decision of the local governing body or administrative agency, not whether the record supports the superior court's decision. Id. See also Goldwire v. Clark, 234 Ga. App. 579, 581(1), 507 S.E.2d 209 (1998); City of Atlanta Government v. Smith, 228 Ga. App. 840, 843(1), 482 S.E.2d 466 (1997).

On writ of certiorari, the superior court applies the any evidence rule and reviews the evidence in the case as though it is an appellate court, deciding whether the record supports the decision of the governmental body.

CONCLUSIONS OF LAW

6.

After reviewing the record in its entirety, including the physical evidence (the so-called "sex toys"), this court finds that there was sufficient and substantial evidence before the Marietta City Council contained in the record on August 13, 2003 to support its decision to revoke the license of the Plaintiffs' through December 31, 2003.

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The court rejects the challenges contained in the record by the Plaintiffs. In rejecting said challenges, the court notes that the Marietta City Council and the Business License Manager for City of Marietta followed the proper procedure required under the Marietta City Code and, gave sufficient notice to the Plaintiff regarding the hearing and the matters to be considered at the hearing, both before the Business License Manager and the City Council. The court further finds

that the city gave proper notice to the proper party and that the sentence imposed by the Marietta City Council was both supported by the evidence and was proper under the Marietta City Code. Further, the court rejects the constitutional challenges by the Plaintiff in the record and finds same to be without merit.

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The constitutional challenges raised by the Plaintiffs in this matter have been ruled adversely to the Plaintiffs by the appellate courts of Georgia in the following cases: Sewell v. State, 238 Ga. 495, 233 S.E.2d 187 (1977); Chamblee Visuals, LLC v. City of Chamblee, 270 Ga. 33, 506 S.E.2d 113 (1998); Powell v. State, 270 Ga. 327, 510 S.E.2d 18 (1998); Morrison v. State, 272 Ga. 129, 526 S.E.2d 336 (2000).

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The court further finds that the Mandamus portion of the appeal is not applicable here because the Plaintiffs' remedy in this case is certiorari, not mandamus.

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Having reviewed the evidence and the matters listed herein, the court finds:

a) The sex toys and other evidence in this case violate the written conditions of the license.

b) The sex toys and other evidence in this case violate the adult entertainment code of the City of Marietta as referenced in the license.

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RULING ON DEFENDANTS' MOTION TO DISMISS

While the above matters resolve this case, the court deems it appropriate to rule on the city's Motion to Dismiss. The city's Motion is based upon the fact that the license, on its face, expires on December 31, 2003, which is also the date through which the City Council revoked same. The city did not have authority to revoke the license beyond December 31, 2003 because there was, in fact, no license to revoke beyond such date. The court grants the city's Motion to Dismiss based upon the following: Cook v. Harris, 209 Ga. 425, 73 S.E.2d 89 (1952); Stover v. City Council of Fairburn, 220 Ga. 670, 141 S.E.2d 399 (1965); Exley v. Blackmon, 129 Ga. App. 598, 200 S.E.2d 334 (1973); Members of the Board of Commissioners of Whitfield County v. Golden Gallon, Inc., 244 Ga. 209, 259 S.E.2d 463 (1979).

CONCLUSION

For the reasons stated above, it is hereby ordered, adjudged and decreed that the Marietta City Council's decision to revoke the license of Plaintiff is

hereby affirmed in its entirety and the Plaintiffs' petition is hereby denied. In addition, the court grants the Motion to Dismiss filed by the City of Marietta in this case.

SO ORDERED, this 12 day of May, 2004.

_____/s/_____
Judge S. Lark Ingram
Cobb Superior Court
Cobb Judicial Circuit

HAYNIE, LITCHFIELD & CRANE, P.C.
ATTORNEYS AT LAW
222 WASHINGTON AVENUE
MARIETTA, GEORGIA 30060

October 27, 2004

Mr. Alan I. Begner
Begner & Begner, P.C.
1280 West Peachtree Street NW
Suite 230
Atlanta, GA 30309

Via Regular Mail and Facsimile

RE: 1690 Cobb LLC d/b/a Waterpipe World, et al. v. City of Marietta, et al., and

Starship Enterprises of Atlanta, Inc., d/b/x Starship et al. v. City of Marietta et al., and

Inserection, A Fantasy Store, et al. v. City of Marietta, et al.

Supreme Court Case No. S04C1906

Dear Alan:

This letter will confirm that the Supreme Court, on October 25, 2004 denied the Petition for Certiorari on behalf of your three clients above. In case you have not received the ruling, I am attaching same with this letter.

The purpose of this letter is to give your clients until 9:00 a.m. on Monday, November 1, 2004 to cease all operations within the City of Marietta. After that time, the city will enforce the license revocation through the courts and through law enforcement.

While the city realizes that your clients may file a motion for reconsideration, it is believed that such motion would be without merit and that there is little likelihood that the Supreme Court would reverse itself, reverse the Court of Appeals or reverse Judge Lark Ingram in this matter.

With kindest regards.

Sincerely,

_____/s/_____
Douglas R. Haynie

tl

encl.

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

1690 COBB, L.L.C. d/b/a INSERECTION: WATERPIPE WORLD, and ERIK CLABAUGH,	)
Petitioners,	)
v.	)
THE CITY OF MARIETTA, BILL DUNAWAY, in his official capacity as Mayor of the City of Marietta, BETTY L. HUNTER, PETE WALDREP, JOHNNY SINCLAIR, ANDY MORRIS, ANTHONY COLEMAN, JIM KING, and PHILIP GOLDSTEIN, in their official capacities as members of the Marietta City Council,	)
Respondents/Defendants.	)

031-6177-34

[ENTERED: AUGUST 15, 2003]

PETITION FOR WRIT OF MANDAMUS AND WRIT OF CERTIORARI

COME NOW, Petitioners 1690 COBB, L.L.C. d/b/a INSERECTION: WATERPIPE WORLD and ERIK CLABAUGH ("Petitioners"), through undersigned counsel, who, pursuant to O.C.G.A. §5-4-1,

et seq., make this application for the issuance of a writ of mandamus and a writ of certiorari by the Superior Court to THE CITY OF MARIETTA, BILL DUNAWAY, in his official capacity as Mayor of the City of Marietta, BETTY L. HUNTER, PETE WALDREP, JOHNNY SINCLAIR, ANDY MORRIS, ANTHONY COLEMAN, JIM KING, and PHILIP GOLDSTEIN in their official capacities as members of the Marietta City Council, ("Respondents/Defendants") and state as follows:

Jurisdiction and Venue

1.

Petitioner 1690 Cobb, L.L.C. d/b/a Inserection: Waterpipe World is a properly organized Georgia Limited Liability Company, who operates a properly licensed general retail store at 1690 Cobb Parkway South, Marietta, Cobb County, Georgia.

2.

Petitioner Erik Clabaugh is the agent of the applicant 1690 Cobb, L.L.C.

3.

Respondent/Defendant City of Marietta, Georgia is a municipal corporation, located in Georgia, created and existing under the laws of the State of Georgia. Respondent/Defendant City of Marietta may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor,

Marietta, Georgia, or designated representative, and is subject to the jurisdiction and venue of this Court.

4.

Respondent/Defendant Bill Dunaway is the Mayor of the City of Marietta. Respondent/Defendant Dunaway may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor, Marietta, Georgia, or other designated representative. Respondent/Defendant Dunaway is therefore subject to the jurisdiction and venue of this court.

5.

Respondent/Defendant Betty L. Hunter is a member of the Marietta City Council. Respondent/Defendant Hunter may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor, Marietta, Georgia, or other designated representative. Respondent/Defendant Hunter is therefore subject to the jurisdiction and venue of this court.

6.

Respondent/Defendant Pete Waldrep is a member of the Marietta City Council. Respondent/Defendant Waldrep may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor, Marietta, Georgia, or other designated representative.

Respondent/Defendant Waldrep is therefore subject to the jurisdiction and venue of this court.

7.

Respondent/Defendant Johnny Sinclair is a member of the Marietta City Council. Respondent/Defendant Sinclair may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor, Marietta, Georgia, or other designated representative. Respondent/Defendant Sinclair is therefore subject to the jurisdiction and venue of this court.

8.

Respondent/Defendant Andy Morris is a member of the Marietta City Council. Respondent/Defendant Morris may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor, Marietta, Georgia, or other designated representative. Respondent/Defendant Morris is therefore subject to the jurisdiction and venue of this court.

9.

Respondent/Defendant Anthony Coleman is a member of the Marietta City Council. Respondent/Defendant Coleman may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor, Marietta, Georgia, or other designated representative.

Respondent/Defendant Coleman is therefore subject to the jurisdiction and venue of this court.

10.

Respondent/Defendant Jim King is a member of the Marietta City Council. Respondent/Defendant King may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor, Marietta, Georgia, or other designated representative. Respondent/Defendant King is therefore subject to the jurisdiction and venue of this court.

11.

Respondent/Defendant Philip Goldstein is a member of the Marietta City Council. Respondent/Defendant Goldstein may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor, Marietta, Georgia, or other designated representative. Respondent/Defendant Goldstein is therefore subject to the jurisdiction and venue of this court.

Facts

12.

Petitioners own and operate a properly licensed general retail store at 1690 Cobb Parkway South, Marietta, Cobb County, Georgia, which sells novelties, tobacco accessories, and some adult material.

13.

Petitioners were issued, all required licenses for their business, including a valid business license, which was issued by the City of Marietta Business Licensing Department.

14.

On or about June 13th 2003, Respondents sent Petitioners' manager a show cause letter informing them that a hearing would take place on the issue of whether or not to suspend or revoke Petitioners' Marietta Business License. Exhibit A.

15.

Following a July 18th 2003 hearing, Respondents sent Petitioners another letter dated June 23rd 2003. This letter served as notice of revocation of Petitioners' Marietta Business License. Exhibit B.

16.

Petitioners appealed the revocation on July 1st 2003. Exhibit C.

17.

On August 13th 2003, Petitioners appeared before the Marietta City Council to appeal the revocation of their business license.

18.

On August 13th 2003, Respondents denied Petitioners' appeal, and stated that the business license revocation would go into effect Friday, August 15 2003.

Errors of Law

19.

Respondents' show cause letter of June 13th 2003 was Constitutionally defective in violation of Article I, Section I, Paragraph I (Due Process) of the Georgia Constitution and the Fourteenth Amendment of the United States Constitution, because it failed to put the license holder on notice as to the charges against it.

20.

Respondents violated City of Marietta Code Section 8-4-405 (A) (revocation and appeal) because the charges against Petitioners lacked a specific violation or violations.

21.

Respondents violated City of Marietta Code Section 8-4-405 (A) (revocation and appeal) because said section requires that a show cause letter be served upon the license holder, instead Respondents served the show cause letter on the acting manager of Petitioners' store.

22.

Respondents violated City of Marietta Code Section 8-4-405 (B) because the show cause letter of June 13th 2003 did not contain sufficient grounds upon which to revoke a license.

23.

Respondents violated City of Marietta Code Section 8-4-430 by failing to cite and convict Petitioners before the Marietta Municipal Court for alleged violations as a condition precedent to revocation.

24.

Respondents violated City of Marietta Code Section 8-4-405 (D) because this Code section limits the discipline permitted for the alleged violations to no more than a 90 day suspension of the license, for a first offense.

25.

O.C.G.A. 16-12-80 (C) in unconstitutional in violation of the substantive Due Process rights to privacy and liberty, as guaranteed by the Fifth Amendment of the United States Constitution and Article I, Section I, Paragraph I of the Georgia Constitution. *Lawrence* v. Texas, 123 S. Ct. 2472, 2475 (2003),; *Williams* v. *Pryor* 220 F.Supp.2d 1257 (N.D. Ala. 2002).

WHEREFORE, Petitioners request that this Court grant the following relief:

(a) that the Court sanction a Writ of Certiorari in the manner provided by law;

(b) that this Court overturn and set aside the decision of Respondents;

(c) that this Court issue a writ of mandamus ordering Respondents to return and reinstate Petitioners' City of Marietta Business License for the property at 1690 Cobb Parkway South, Marietta, Cobb County, Georgia;

(d) for such other relief this Court deems appropriate.

This 15th day of August, 2003.

Respectfully submitted,

_____/s/_____
ALAN BEGNER
GA BAR NO. 046975

_____/s/_____
ERIC JENSEN
GA BAR NO. 391259

Begner & Begner, P.C.
1280 West Peachtree Street
Suite 230
Atlanta, Georgia 30309
404-872-5727

EXHIBIT
A

BUSINESS LICENSE
205 Lawrence Street
P.O. Box 609
Marietta, Georgia 30061

6/13/03 12:2
Perfected by
delivery to
Brian Hall
(Manager)

Phone (770) 794-5520
Fax (770) 794-5685
http://www.city.marietta.ga.us

June 13, 2003

VIA HAND DELIVERY

Mr. Erik Clabaugh
1690 COBB LLC
d/b/a Inserection Water Pipe World
1739 Cheshire Bridge Rd., N.E.
Atlanta, GA 30324-4921

Re: License Number 03-41832 issued to 1690 COBB LLC d/b/a Inserection Water Pipe World, 1690 Cobb Parkway South, Marietta, Georgia

Dear Mr. Clabaugh:

You are hereby given notice that the Business License Manager of the City of Marietta will hold a hearing on whether or not to suspend or revoke the above license issued by the City of Marietta. The hearing will be on Wednesday, June 18, 2003 in the Marietta City Council chambers at 10:30 a.m. This letter shall constitute written notice of the time and place of the hearing.

The basis for the hearing on whether to suspend or revoke the above license is set forth in Marietta City Code Section 8-4-405(B)(3) which provides as follows:

"An applicant has knowingly allowed the violation of an ordinance of the city or a violation of any criminal law of the State of Georgia (a misdemeanor or a felony) to occur on the premises; and that such violation is materially related to the operation of said business."

Sincerely,

_____/s/_____
Scott Everingham
Business License Manager

cc: Mr. William J. Bruton, Jr., City Manager
Chief Bobby D. Moody, Marietta Police Department
Mr. Douglas R. Haynie, City Attorney
Mr. Robert I. Donovan, City Solicitor

EXHIBIT
B

BUSINESS LICENSE
205 Lawrence Street
P.O. Box 609
Marietta, Georgia 30061

Phone (770) 794-5520
Fax (770) 794-5685
http://www.city.marietta.ga.us

June 23, 2003

Mr. Erik Clabaugh
1690 COBB LLC
d/b/a Inserection Water Pipe World
1739 Cheshire Bridge Rd., N.E.
Atlanta, GA 30324-4921

Re: License Number 03-41832 issued to 1690 COBB LLC d/b/a Inserection Water Pipe World, 1690 Cobb Parkway South, Marietta, Georgia

Dear Mr. Clabaugh:

The Business License Manager of the City of Marietta held a hearing regarding the above license on Wednesday, June 18, 2003 pursuant to the notice delivered to the licensee on June 13, 2003, a copy of which is attached. The purpose of the hearing, as set

forth in the notice of the hearing and the Marietta City Code, was to determine whether to suspend or revoke the occupation tax certificate or any other license issued to the licensee by the City of Marietta. The hearing was conducted in accordance with the Marietta City Code and in particular, Code Section 8-4-405. The license at issue in this matter is attached. Notice of the hearing was hand delivered to the licensee on June 13, 2003 and was delivered to Mr. Brian Hall, Manager.

The following attorneys participated in the hearing as follows: Mr. Robert Donovan presented evidence on behalf of the Marietta Police Department; Mr. Alan Begner presented argument on behalf of the above licensee and represented the licensee at the hearing; City attorney Doug Haynie assisted the Business License Manager in this matter. By agreement of the parties, the hearings were consolidated for the purpose of this hearing. A court reporter employed by Mr. Begner recorded the proceedings.

In issuing this ruling, I have considered the arguments presented by the attorney for the licensees, all evidence presented at the hearing and the testimony given during the hearing. In addition, I have considered the severity of the allegations, the evidence submitted and the testimony presented and have considered all other matters required by City Code Section 8-4-405.

Prior to the notice of the hearing given to the licensee on June 13, 2003, the City Manager gave approval for the Business License Manager to proceed with notice and hearing in this matter.

As part of the review of the evidence in this matter, the Business License Manager has reviewed the Business License/Occupation Tax Certificate, attached, including the conditions and stipulations attached thereto.

Based upon the advice of the city attorney, the motions made by the attorney for the licensee and the legal issues raised are denied and found to be without merit.

Based upon the above, and based upon the review of the items introduced into evidence in the hearing on June 18, 2003 and the testimony presented, I hereby find that evidence presented and the sale of the items introduced into evidence upon and within the premises licensed pursuant to the attached license constitute a violation of the conditions and stipulations attached to the license and that same constitute a violation of the ordinances of the City of Marietta, including the adult entertainment ordinance of the City of Marietta as referenced in Paragraph 6 of the conditions and stipulations attached to the license. In addition, I find that the evidence and the sale of the items introduced into evidence upon and within the licensed premises constitute a violation of the criminal laws of the State of Georgia, including O.C.G.A. §16-

12-80(c). I further find that the above violations are materially related to the operation of the business of the licensee.

Based upon the above and based upon my review and consideration of all evidence and testimony submitted in the above matter, as well as the severity of the allegations, I hereby revoke, in its entirety, license number 03-41832 effective today's date, June 23, 2003. Subject to appeal, the revocation shall commence today, June 23, 2003 and continue through the date of expiration of the license, December 31, 2003. Based upon this ruling and the revocation of such license, all sales, pending appeal, must immediately cease and desist and the licensee shall surrender the attached license to the Business License Manager of the City of Marietta at the expiration of the ten (10) day appeal period. In the event the licensee desires to appeal this decision, same shall be done within ten (10) days pursuant to Code Section 8-4-405.

Sincerely,

_____/s/_____
Scott Everingham
Business License Manager

cc: Mr. William F. Bruton, Jr., City Manager
Chief Bobby D. Moody, Marietta Police Department
Mr. Douglas R. Haynie, City Attorney (Via Facsimile No. 770-424-8900)
Mr. Robert I. Donovan, City Solicitor (Via Facsimile No. 770-427-9891)
Mr. Alan I. Begner (Via Facsimile No. 404-872-5763)

Attachments: Notice of hearing dated June 13, 2003
License Number 03-41832

EXHIBIT
C

Begner & Begner, P.C.
Attorneys at Law

Alan I. Begner
Cory G. Begner
Eric L. Jensen
Katie Wood

1280 West Peachtree Street
Suite 230
Atlanta, Georgia 30309

July 1, 2003

VIA HAND DELIVERY
Mayor and Council
City of Marietta
205 Lawrence Street
Marietta, Georgia 30061

Re: License Number 03-41832 issued to 1690 COBB L.L.C. d/b/a Inserection Water Pipe World, 1690 Cobb Parkway South, Marietta, Georgia

Pursuant to Section 8-4-405 of the Marietta City Code, the above license holder hereby appeals the June 23, 2003 decision of the Business License Manager to revoke all licenses issued to this applicant at the above location.

Yours very sincerely,

_____/s/_____
Alan I. Begner

AIB/kdc
BC: Scott Everingham

Telephone: 404-872-5727 * Fax: 404-872-5763 *
e-mail: abegner@mindspring.com

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

INSERECTION: A FANTASY STORE, and DIME ONE, L.L.C., and RALPH MEGGINSON	)	
Petitioners,	)	CIVIL ACTION
v.	)	FILE NO. _____
THE CITY OF MARIETTA, BILL DUNAWAY, in his official capacity as mayor of the City of Marietta BETTY L. HUNTER, PETE WALDREP, JOHNNY SINCLAIR, ANDY MORRIS, ANTHONY COLEMAN, JIM KING, and, PHILIP GOLDSTEIN, in their official capacities as members of the Marietta City Council,	)	
Respondents/Defendants.	)	

[ENTERED: AUGUST 15, 2003]

PETITION FOR WRIT OF MANDAMUS AND WRIT OF CERTIORARI

COME NOW, Inserection: A Fantasy Store, Dime One, L.L.C., and Ralph Megginson (Petitioners) and pursuant to O.C.G.A. §5-4-1, et seq., make this application for the issuance of a writ of mandamus and a writ of certiorari by the Superior Court to the City of Marietta and Bill Dunaway, in his official capacity as mayor of the City of Marietta, and Betty L. Hunter, Pete Waldrep, Johnny Sinclair, Andy Morris, Anthony Coleman, Jim King, and Philip Goldstein, in their official capacities as members of the Marietta City Council, and state as follows:

Jurisdiction and Venue

1.

Petitioner Dime One, L.L.C. d/b/a Inserection: A Fantasy Store is a properly organized Georgia Limited Liability Company, who operates a properly licensed general retail store at 63 Cobb Parkway North, Marietta, Cobb County, Georgia.

2.

Petitioner Ralph Megginon is the agent of the applicant Dime One, L.L.C.

3.

Respondent/Defendant City of Marietta, Georgia is a municipal corporation, located in Georgia, created and existing under the laws of the State of Georgia. Respondent/Defendant City of Marietta may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor, Marietta, Georgia, or

designated representative, and is subject to the jurisdiction and venue of this Court.

4.

Respondent/Defendant Bill Dunaway is the Mayor of the City of Marietta. Respondent/Defendant Dunaway may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor, Marietta, Georgia, or other designated representative. Respondent/Defendant Dunaway is therefore subject to the jurisdiction and venue of this court.

5.

Respondent/Defendant Betty L. Hunter is a member of the Marietta City Council. Respondent/Defendant Hunter may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor, Marietta, Georgia, or other designated representative. Respondent/Defendant Hunter is therefore subject to the jurisdiction and venue of this court.

6.

Respondent/Defendant Pete Waldrep is a member of the Marietta City Council Respondent/Defendant Waldrep may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor, Marietta, Georgia, or other designated representative. Respondent/Defendant Waldrep is therefore subject to the jurisdiction and venue of this court.

7.

Respondent/Defendant Johnny Sinclair is a member of the Marietta City Council. Respondent/Defendant Sinclair may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor, Marietta, Georgia, or other designated representative. Respondent/Defendant Sinclair is therefore subject to the jurisdiction and venue of this court.

8.

Respondent/Defendant Andy Morris is a member of the Marietta City Council. Respondent/Defendant Morris may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor, Marietta, Georgia, or other designated representative. Respondent/Defendant Morris is therefore subject to the jurisdiction and venue of this court.

9.

Respondent/Defendant Anthony Coleman is a member of the Marietta City Council. Respondent/Defendant Coleman may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor, Marietta, Georgia, or other designated representative. Respondent/Defendant Coleman is therefore subject to the jurisdiction and venue of this court.

10.

Respondent/Defendant Jim King is a member of the Marietta City Council. Respondent/Defendant King may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor, Marietta, Georgia, or other designated representative. Respondent/Defendant King is therefore subject to the jurisdiction and venue of this court.

11.

Respondent/Defendant Philip Goldstein is a member of the Marietta City Council. Respondent/Defendant Goldstein may be served through City of Marietta Risk Manager Dennis Stover at 205 Lawrence Street, 3rd Floor, Marietta, Georgia, or other designated representative. Respondent/Defendant Goldstein is therefore subject to the jurisdiction and venue of this court.

Facts

12.

Petitioners own and operate a properly licensed general retail store at 63 Cobb Parkway North, Marietta, Cobb County, Georgia, which sells novelties, tobacco accessories, and some adult material.

13.

Petitioners were issued all required licenses for their business, including a valid business license, which was issued by the City of Marietta Business Licensing Department.

14.

On or about June 13th 2003, Respondents sent Petitioners' manager a show cause letter informing them that a hearing would take place on the issue of whether or not to suspend or revoke Petitioners' Marietta Business License. Exhibit A.

15.

Following a July 18th 2003 hearing, Respondents sent Petitioners another letter dated June 23rd 2003. This letter served as notice of revocation of Petitioners' Marietta Business License. Exhibit B.

16.

Petitioners appealed the revocation on July 1st 2003. Exhibit C.

17.

On August 13th 2003, Petitioners appeared before the Marietta City Council to appeal the revocation of their business license.

18.

On August 13th 2003, Respondents denied Petitioners' appeal, and stated that the business license revocation would go into effect Friday, August 15th 2003.

Errors of Law

19.

Respondents' show cause letter of June 13th 2003 was Constitutionally defective in violation of Article I, Section I, Paragraph I (Due Process) of the Georgia Constitution and the Fourteenth Amendment of the United States Constitution, because it failed to put the license holder on notice as to the charges against it.

20.

Respondents violated City of Marietta Code Section 8-4-405 (A) (revocation and appeal) because the charges against Petitioners lacked a specific violation or violations.

21.

Respondents violated City of Marietta Code Section 8-4-405 (A) (revocation and appeal) because said section requires that a show cause letter be served upon the license holder, instead Respondents served the show cause letter on the acting manager of Petitioners' store.

22.

Respondents violated City of Marietta Code Section 8-4-405 (B) because the show cause letter of June 13th 2003 did not contain sufficient grounds upon which to revoke a license.

23.

Respondents violated City of Marietta Code Section 8-4-430 by failing to cite and convict Petitioners before the Marietta Municipal Court for alleged violations as a condition precedent to revocation.

24.

Respondents violated City of Marietta Code Section 8-4-405 (D) because this Code section limits the discipline permitted for the alleged violations to no more than a 90 day suspension of the license, for a first offense.

25.

O.C.G.A. 16-12-80 (C) in unconstitutional in violation of the substantive Due Process rights to privacy and liberty, as guaranteed by the Fifth Amendment of the United States Constitution and Article I, Section I, Paragraph I of the Georgia Constitution. *Lawrence v. Texas,* 123 S. Ct. 2472, 2475 (2003),; *Williams v. Pryor* 220 F.Supp.2d 1257 (N.D. Ala. 2002).

WHEREFORE, Petitioners request that this Court grant the following relief:

(a) that the Court sanction a Writ of Certiorari in the manner provided by law;

(b) that this Court overturn and set aside the decision of Respondents;

(c) that this Court issue a writ of mandamus ordering Respondents to return and reinstate Petitioners' City of Marietta Business License for the property at 63 Cobb Parkway North, Marietta, Cobb County, Georgia;

(d) for such other relief this Court deems appropriate.

This 15th day of August, 2003.

Respectfully submitted,

_____/s/_____
ALAN BEGNER
GA BAR NO. 046975

_____/s/_____
ERIC JENSEN
GA BAR NO. 391259

Begner & Begner, P.C.
1280 West Peachtree Street
Suite 230
Atlanta, Georgia 30309
404-872-5727

EXHIBIT
A

BUSINESS LICENSE
205 Lawrence Street
P.O. Box 609
Marietta, Georgia 30061

6/13/03
Perfected by
Delivery to
Nicki Strong
(Manager)

Phone (770) 794-5520
Fax (770) 794-5685
http://www.city.marietta.ga.us

June 13, 2003

VIA HAND DELIVERY

Mr. Ralph Megginson
DIME ONE LLC d/b/a
Inserection A Fantasy Store
1739 Cheshire Bridge Rd., N.E.
Atlanta, GA 30324-4921

Re: License Number 03-49421 issued to DIME ONE LLC d/b/a Inserection A Fantasy Store, 63 Cobb Parkway North, Marietta, Georgia

Dear Mr. Megginson:

You are hereby given notice that the Business License Manager of the City of Marietta will hold a hearing on whether or not to suspend or revoke the above license issued by the City of Marietta. The hearing will be on Wednesday, June 18, 2003 in the Marietta City Council chambers at 9:00 a.m. This letter shall constitute written notice of the time and place of the hearing.

The basis for the hearing on whether to suspend or revoke the above license is set forth in Marietta City Code Section 8-4-405(B)(3) which provides as follows:

"An applicant has knowingly allowed the violation of an ordinance of the city or a violation of any criminal law of the State of Georgia (a misdemeanor or a felony) to occur on the premises; and that such violation is materially related to the operation of said business."

Sincerely,

_____/s/_____
Scott Everingham
Business License Manager

cc: Mr. William J. Bruton, Jr., City Manager
Chief Bobby D. Moody, Marietta Police Department
Mr. Douglas R. Haynie, City Attorney
Mr. Robert I. Donovan, City Solicitor

EXHIBIT
B

BUSINESS LICENSE
205 Lawrence Street
P.O. Box 609
Marietta, Georgia 30061

Phone (770) 794-5520
Fax (770) 794-5685
http://www.city.marietta.ga.us

June 23, 2003

Mr. Ralph Megginson
DIME ONE LLC d/b/a
Inserection A Fantasy Store
1739 Cheshire Bridge Rd., N.E.
Atlanta, GA 30324-4921

Re: License Number 03-49421 issued to DIME ONE LLC d/b/a Inserection A Fantasy Store, 63 Cobb Parkway North, Marietta, Georgia

Dear Mr. Megginson:

The Business License Manager of the City of Marietta held a hearing regarding the above license on Wednesday, June 18, 2003 pursuant to the notice delivered to the licensee on June 13, 2003, a copy of

which is attached. The purpose of the hearing, as set forth in the notice of the hearing and the Marietta City Code, was to determine whether to suspend or revoke the occupation tax certificate or any other license issued to the licensee by the City of Marietta. The hearing was conducted in accordance with the Marietta City Code and in particular, Code Section 8-4-405. The license at issue in this matter is attached. Notice of the hearing was hand delivered to the licensee on June 13, 2003 and was delivered to Ms. Nicki Strong, Manager.

The following attorneys participated in the hearing as follows: Mr. Robert Donovan presented evidence on behalf of the Marietta Police Department; Mr. Alan Begner presented argument on behalf of the above licensee and represented the licensee at the hearing; City attorney Doug Haynie assisted the Business License Manager in this matter. By agreement of the parties, the hearings were consolidated for the purpose of this hearing. A court reporter employed by Mr. Begner recorded the proceedings.

In issuing this ruling, I have considered the arguments presented by the attorney for the licensees, all evidence presented at the hearing and the testimony given during the hearing. In addition, I have considered the severity of the allegations, the evidence submitted and the testimony presented and have considered all other matters required by City Code Section 8-4-405.

Prior to the notice of the hearing given to the licensee on June 13, 2003, the City Manager gave approval for

the Business License Manager to proceed with notice and hearing in this matter.

As part of the review of the evidence in this matter, the Business License Manager has reviewed the Business License/Occupation Tax Certificate, attached, including the conditions and stipulations attached thereto.

Based upon the advice of the city attorney, the motions made by the attorney for the licensee and the legal issues raised are denied and found to be without merit.

Based upon the above, and based upon the review of the items introduced into evidence in the hearing on June 18, 2003 and the testimony presented, I hereby find that evidence presented and the sale of the items introduced into evidence upon and within the premises licensed pursuant to the attached license constitute a violation of the conditions and stipulations attached to the license and that same constitute a violation of the ordinances of the City of Marietta, including the adult entertainment ordinance of the City of Marietta as referenced in Paragraph 6 of the conditions and stipulations attached to the license. In addition, I find that the evidence and the sale of the items introduced into evidence upon and within the licensed premises constitute a violation of the criminal laws of the State of Georgia, including O.C.G.A. §16-12-80(c). I further find that the above violations are materially related to the operation of the business of the licensee.

Based upon the above and based upon my review and consideration of all evidence and testimony submitted in the above matter, as well as the severity of the allegations, I hereby revoke, in its entirety, license number 03-49421 effective today's date, June 23, 2003. Subject to appeal, the revocation shall commence today, June 23, 2003 and continue through the date of expiration of the license, December 31, 2003. Based upon this ruling and the revocation of such license, all sales, pending appeal, must immediately cease and desist and the licensee shall surrender the attached license to the Business License Manager of the City of Marietta at the expiration of the ten (10) day appeal period. In the event the licensee desires to appeal this decision, same shall be done within ten (10) days pursuant to Code Section 8-4-405.

Sincerely,

_____/s/_____
Scott Everingham
Business License Manager

cc: Mr. William F. Bruton, Jr., City Manager
Chief Bobby D. Moody, Marietta Police Department
Mr. Douglas R. Haynie, City Attorney (Via Facsimile No. 770-424-8900)
Mr. Robert I. Donovan, City Solicitor (Via Facsimile No. 770-427-9891)
Mr. Alan I. Begner (Via Facsimile No. 404-872-5763)

Attachments: Notice of hearing dated June 13, 2003
License Number 03-49421

EXHIBIT
C

Begner & Begner, P.C.
Attorneys at Law

Alan I. Begner
Cory G. Begner
Eric L. Jensen
Katie Wood

1280 West Peachtree Street
Suite 230
Atlanta, Georgia 30309

July 1, 2003

VIA HAND DELIVERY
Mayor and Council
City of Marietta
205 Lawrence Street
Marietta, Georgia 30061

Re: License Number 03-49421 issued to DIME ONE L.L.C. d/b/a Inserection A Fantasy Store, 63 Cobb Parkway North, Marietta, Georgia

Pursuant to Section 8-4-405 of the Marietta City Code, the above license holder hereby appeals the June 23, 2003 decision of the Business License Manager to revoke all licenses issued to this applicant at the above location.

Yours very sincerely,

_____/s/_____
Alan I. Begner

AIB/kdc
BC: Scott Everingham

Telephone: 404-872-5727 * Fax: 404-872-5763 *
e-mail: abegner@mindspring.com

BUSINESS LICENSE
205 Lawrence Street
P.O. Box 609
Marietta, Georgia 30061

Phone (770) 794-5520
Fax (770) 794-5685
http://www.city.marietta.ga.us

June 23, 2003

Mr. Erik Clabaugh
1690 COBB LLC
d/b/a Inserection Water Pipe World
1739 Cheshire Bridge Rd., N.E.
Atlanta, GA 30324-4921

Re: License Number 03-41832 issued to 1690 COBB LLC d/b/a Inserection Water Pipe World, 1690 Cobb Parkway South, Marietta, Georgia

Dear Mr. Clabaugh:

The Business License Manager of the City of Marietta held a hearing regarding the above license on Wednesday, June 18, 2003 pursuant to the notice delivered to the licensee on June 13, 2003, a copy of which is attached. The purpose of the hearing, as set forth in the notice of the hearing and the Marietta City Code, was to determine whether to suspend or revoke the occupation tax certificate or any other license

issued to the licensee by the City of Marietta. The hearing was conducted in accordance with the Marietta City Code and in particular, Code Section 8-4-405. The license at issue in this matter is attached. Notice of the hearing was hand delivered to the licensee on June 13, 2003 and was delivered to Mr. Brian Hall, Manager.

The following attorneys participated in the hearing as follows: Mr. Robert Donovan presented evidence on behalf of the Marietta Police Department; Mr. Alan Begner presented argument on behalf of the above licensee and represented the licensee at the hearing; City attorney Doug Haynie assisted the Business License Manager in this matter. By agreement of the parties, the hearings were consolidated for the purpose of this hearing. A court reporter employed by Mr. Begner recorded the proceedings.

In issuing this ruling, I have considered the arguments presented by the attorney for the licensees, all evidence presented at the hearing and the testimony given during the hearing. In addition, I have considered the severity of the allegations, the evidence submitted and the testimony presented and have considered all other matters required by City Code Section 8-4-405.

Prior to the notice of the hearing given to the licensee on June 13, 2003, the City Manager gave approval for the Business License Manager to proceed with notice and hearing in this matter.

As part of the review of the evidence in this matter, the Business License Manager has reviewed the Business License/Occupation Tax Certificate, attached, including the conditions and stipulations attached thereto.

Based upon the advice of the city attorney, the motions made by the attorney for the licensee and the legal issues raised are denied and found to be without merit.

Based upon the above, and based upon the review of the items introduced into evidence in the hearing on June 18, 2003 and the testimony presented, I hereby find that evidence presented and the sale of the items introduced into evidence upon and within the premises licensed pursuant to the attached license constitute a violation of the conditions and stipulations attached to the license and that same constitute a violation of the ordinances of the City of Marietta, including the adult entertainment ordinance of the City of Marietta as referenced in Paragraph 6 of the conditions and stipulations attached to the license. In addition; I find that the evidence and the sale of the items introduced into evidence upon and within the licensed premises constitute a violation of the criminal laws of the State of Georgia, including O.C.G.A. §16-12-80(c). I further find that the above violations are materially related to the operation of the business of the licensee.

Based upon the above and based upon my review and consideration of all evidence and testimony submitted in the above matter, as well as the severity

of the allegations, I hereby revoke, in its entirety, license number 03-41832 effective today's date, June 23, 2003. Subject to appeal, the revocation shall commence today, June 23, 2003 and continue through the date of expiration of the license, December 31, 2003. Based upon this ruling and the revocation of such license, all sales, pending appeal, must immediately cease and desist and the licensee shall surrender the attached license to the Business License Manager of the City of Marietta at the expiration of the ten (10) day appeal period. In the event the licensee desire [ ] decision, same shall be done within ten (10) days pursuant to Code Section 8-4- [ ]

Sincerely,

_____/s/_____
Scott Everingham
Business License Manager

cc: Mr. William F. Bruton, Jr., City Manager
Chief Bobby D. Moody, Marietta Police Department
Mr. Douglas R. Haynie, City Attorney (Via Facsimile No. 770-424-8900)
Mr. Robert I. Donovan, City Solicitor (Via Facsimile No. 770-427-9891)
Mr. Alan I. Begner (Via Facsimile No. 404-872-5763)

Attachments: Notice of hearing dated June 13, 2003
License Number 03-41832

City of Marietta Business License and Revenue Division
205 LAWRENCE ST NE * DRAWER 609 *
MARIETTA GA 30061
(770) 794-5520

BUSINESS LICENSE/OCCUPATION
TAX CERTIFICATE
PLEASE DISPLAY AT ALL TIMES
SUBJECT TO ALL ORDINANCES OF
MAYOR AND COUNCIL

NOT TRANSFERABLE

ACCOUNT NUMBER 9911826 5993000

NUMBER 03-41832

INSERSECTION WATER PIPE WORLD
ATTN KEN TORBUSH
1739 CHESHIRE BRIDGE RD NE
ATLANTA GA 30324-4921

FOR YEAR	2003
EXPIRATION DATE	12/31/03
BEGIN OPERATION DATE	3/05/99

NOTIFY THIS OFFICE OF ANY CHANGE OF ADDRESS, OWNERSHIP FIRM NAME, OR CLASSIFICATION

OWNER 1690 COBB LLC

DESCRIPTION OF SIC CODE

CIGAR AND TOBACCO STORES

$284.00

CLASS 2B

BUSINESS ADDRESS:
1690 COBB PKWY S D
MARIETTA GA 30062-3782

THIS LICENSE IS SUBJECT TO THE CONDITIONS AND STIPULATIONS WHICH ARE ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE. LICENSE NOT VALID WITHOUT ATTACHED CONDITIONS AND STIPULATIONS.

TAX	$	284.00
PENALTY	$	.00
TOTAL	$	284.00
DATE PAID		4/01/03

SIGNED _____/s/_____
SCOTT EVERINGHAM

CONDITIONS AND STIPULATIONS REGARDING LICENSE ISSUED BY THE CITY OF MARIETTA TO 1690 COBB LLC

The following additional stipulations are attached to any license which may be issued by the City of Marietta to 1690 Cobb LLC and are incorporated by reference into the license and are considered a part of the license as follows:

1.

1690 Cobb LLC (hereinafter "licensee") shall supply to the City of Marietta no later than February 1, 2000, a statement of income and expenses for the license period ending December 31, 1999 and a balance sheet as of December 31, 1999. The documents supplied shall contain, at a minimum, the total sales (income) categorized by adult videos, adult magazines, tobacco, water pipes, and other and the total purchases (expenses) categorized by adult videos, adult magazines, tobacco, water pipes, and other and the total inventory categorized by adult videos, adult magazines, tobacco, water pipes, and other.

2

Licensee shall obtain and retain a current and valid tobacco license from the State of Georgia.

3.

The City of Marietta shall have the right to make periodic inspections of the premises and inventory.

4.

Licensee shall not allow any persons within the licensed premises who are under the years of eighteen (18) years of age.

5.

Licensee agrees to comply with the Code of Ordinances of the City of Marietta.

6.

Licensee agrees that it will not sell, display or have on the premises any instruments, devices, paraphernalia, products, article or articles which are designed, sold or viewed for use in connection with "specified sexual activities" as defined in the Marietta Adult Entertainment Code or which are sold or marketed primarily for stimulation of human genital organs.

7.

Licensee agrees that it shall not:

(a) Have twenty percent (20%) or more of its total retail floor space which is open to the public used for the sale of adult videos or other

adult items defined in Section 8-20-020 of the Code of the City of Marietta.

(b) Derive more than twenty percent (20%) of its revenue from the sale of adult videos or other items defined in Section 8-20-020 of the Code of the City of Marietta, and

(c) Have more than twenty percent (20%) of its stock in trade diverted to adult videos or other items defined in Section 8-20-020 of the Code of the City of Marietta.

8.

This license shall be good only at 1690 Cobb Parkway, Suite D, Marietta , Georgia 30062.

This 24 day of June, 1999.

1690 COBB LLC

BY: _____/s/_____
ERIK CLABAUGH

_____/s/_____
ALAN I. BEGNER,
Attorney for 1690 Cobb LLC

BUSINESS LICENSE
205 Lawrence Street
P.O. Box 609
Marietta, Georgia 30061

Phone (770) 794-5520
Fax (770) 794-5685
http://www.city.marietta.ga.us

June 23, 2003

Mr. Ralph Megginson
DIME ONE LLC
d/b/a Inserection A Fantasy Store
1739 Cheshire Bridge Rd., N.E.
Atlanta, GA 30324-4921

Re: License Number 03-49421 issued to DIME ONE LLC d/b/a Inserection A Fantasy Store, 63 Cobb Parkway North, Marietta, Georgia

Dear Mr. Megginson:

The Business License Manager of the City of Marietta held a hearing regarding the above license on Wednesday, June 18, 2003 pursuant to the notice delivered to the licensee on June 13, 2003, a copy of which is attached. The purpose of the hearing, as set forth in the notice of the hearing and the Marietta City Code, was to determine whether to suspend or revoke the occupation tax certificate or any other license

issued to the licensee by the City of Marietta. The hearing was conducted in accordance with the Marietta City Code and in particular, Code Section 8-4-405. The license at issue in this matter is attached. Notice of the hearing was hand delivered to the licensee on June 13, 2003 and was delivered to Ms. Nicki Strong, Manager.

The following attorneys participated in the hearing as follows: Mr. Robert Donovan presented evidence on behalf of the Marietta Police Department; Mr. Alan Begner presented argument on behalf of the above licensee and represented the licensee at the hearing; City attorney Doug Haynie assisted the Business License Manager in this matter. By agreement of the parties, the hearings were consolidated for the purpose of this hearing. A court reporter employed by Mr. Begner recorded the proceedings.

In issuing this ruling, I have considered the arguments presented by the attorney for the licensees, all evidence presented at the hearing and the testimony given during the hearing. In addition, I have considered the severity of the allegations, the evidence submitted and the testimony presented and have considered all other matters required by City Code Section 8-4-405.

Prior to the notice of the hearing given to the licensee on June 13, 2003, the City Manager gave approval for the Business License Manager to proceed with notice and hearing in this matter.

As part of the review of the evidence in this matter, the Business License Manager has reviewed the Business License/Occupation Tax Certificate, attached, including the conditions and stipulations attached thereto.

Based upon the advice of the city attorney, the motions made by the attorney for the licensee and the legal issues raised are denied and found to be without merit.

Based upon the above, and based upon the review of the items introduced into evidence in the hearing on June 18, 2003 and the testimony presented, I hereby find that evidence presented and the sale of the items introduced into evidence upon and within the premises licensed pursuant to the attached license constitute a violation of the conditions and stipulations attached to the license and that same constitute a violation of the ordinances of the City of Marietta, including the adult entertainment ordinance of the City of Marietta as referenced in Paragraph 6 of the conditions and stipulations attached to the license. In addition, I find that the evidence and the sale of the items introduced into evidence upon and within the licensed premises constitute a violation of the criminal laws of the State of Georgia, including O.C.G.A. §16-12-80(c). I further find that the above violations are materially related to the operation of the business of the licensee.

Based upon the above and based upon my review and consideration of all evidence and testimony submitted in the above matter, as well as the severity

of the allegations, I hereby revoke, in its entirety, license number 03-49421 effective today's date, June 23, 2003. Subject to appeal, the revocation shall commence today, June 23, 2003 and continue through the date of expiration of the license, December 31, 2003. Based upon this ruling and the revocation of such license, all sales, pending appeal, must immediately cease and desist and the licensee shall surrender the attached license to the Business License Manager of the City of Marietta at the expiration of the ten (10) day appeal period. In the event the licensee desires to appeal this decision, same shall be done within ten (10) days pursuant to Code Section 8-4-405.

Sincerely,

_____/s/_____
Scott Everingham
Business License Manager

cc: Mr. William F. Bruton, Jr., City Manager
Chief Bobby D. Moody, Marietta Police Department
Mr. Douglas R. Haynie, City Attorney (Via Facsimile No. 770-424-8900)
Mr. Robert I. Donovan, City Solicitor (Via Facsimile No. 770-427-9891)
Mr. Alan I. Begner (Via Facsimile No. 404-872-5763)

Attachments: Notice of hearing dated June 13, 2003
License Number 03-49421

City of Marietta Business License and Revenue Division
205 LAWRENCE ST NE*DRAWER 609*
MARIETTA GA 30061
(770) 794-5520

BUSINESS LICENSE/OCCUPATION
TAX CERTIFICATE
PLESE DISPLAY AT ALL TIMES
SUBJECT TO ALL ORDINANCS OF
MAYOR AND COUNCIL

NOT TRANSFERABLE

ACCOUNT NUMBER 9918564 5399002

NUMBER 03-49421

INSERECTION A FANTASY STORE
1739 CHESHIRE BRIDGE RD NE
ATLANTA GA 30324-4921

FOR YEAR	2003
EXPIRATION DATE	12/31/03
BEGIN OPERATION DATE	03/13/03

NOTIFY THIS OFFICE OF ANY CHANGE OF ADDRESS, OWNERSHIP, FIRM NAME, OR CLASSIFICATION

OWNER DIME ONE LLC

DESCRIPTION OF SIC CODE

GENERAL MERCHANDISE, RETAIL

$25.00

CLASS 02

BUSINESS ADDRESS:
63 COBB PKWY N
MARIETTA GA 30062

THIS LICENSE IS SUBJECT TO THE CONDITIONS AND STIPULATIONS WHICH ARE ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE. LICENSE NOT VALID WITHOUT ATTACHED CONDITIONS AND STIPULATIONS.

TAX	$	25.00
PENALTY	$	.00
TOTAL	$	25.00

DATE PAID 3/17/03

SIGNED_____/s/_____
SCOTT EVERINGHAM

CONDITIONS AND STIPULATIONS REGARDING LICENSE ISSUED BY THE CITY OF MARIETTA TO DIME ONE LLC

The following additional stipulations are attached to any license which may be issued by the City of Marietta to DIME ONE LLC and are incorporated by reference into the license and are considered part of the license as follows:

1.

DIME ONE LLC (hereinafter "licensee") shall supply to the City of Marietta no later than February 1, 2004, a statement of income and expenses for the license period ending December 31, 2003 and a balance sheet as of December 31, 2003. The documents supplied shall contain, at a minimum, the total sales (income) categorized by adult videos, adult magazines, tobacco, water pipes, and other and the total purchases (expenses) categorized by adult videos, adult magazines, tobacco, water pipes, and other and the total inventory categorized by adult videos, adult magazines, tobacco, water pipes, and other.

2

Licensee shall obtain and retain a current and valid tobacco license from the State of Georgia.

3.

The City of Marietta shall have the right to make periodic inspections of the premises and inventory.

4.

Licensee shall not allow any persons within the licensed premises who are under the years of eighteen (18) years of age.

5.

Licensee agrees to comply with the Code of Ordinances of the City of Marietta.

6.

Licensee agrees that it will not sell, display or have on the premises any instruments, devices, paraphernalia, product, articles which are designed, sold or viewed for use in connection with "specified sexual activities" as defined in the Marietta Adult Entertainment Code or which are sold or marketed primarily for stimulation of human genital organs.

7.

Licensee agrees that it shall not:

a) Have twenty percent (20%) or more of its total retail floor space which is open to the public used for the sale of adult

videos or other adult items defined in Section 8-20-020 of the Code of the City of Marietta.

b) Derive more than twenty (20%) of its revenue from the sale of adult videos or other items defined in Section 8-20-020 of the Code of the City of Marietta, and

c) Have more than twenty (20%) of its stock in trade diverted to adult videos or other items defined in Section 8-20-020 of the Code of the City of Marietta.

8.

This license shall be good only at 63 Cobb Parkway North, Marietta, Georgia 30062.

This 13th day of March, 2003.

DIME ONE LLC

BY: _____/s/_____
RALPH MEGGINSON

(3)

No. 04-640

Supreme Court, U.S.
FILED
DEC 10 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

1690 COBB L.L.C. d/b/a WATERPIPE WORLD,
and ERIK CLABAUGH,
and
INSERECTION, A FANTASY STORE,
and ERIK CLABAUGH,

Petitioners,

v.

THE CITY OF MARIETTA, BILL DUNAWAY, in his official capacity as Mayor of THE CITY OF MARIETTA, BETTY L. HUNTER, PETE WALDREP, JOHNNY SINCLAIR, ANDY MORRIS, ANTHONY COLEMAN, JIM KING, and PHILIP GOLDSTEIN, in their official capacity as Members of THE MARIETTA CITY COUNCIL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF GEORGIA, COBB COUNTY

BRIEF IN OPPOSITION

DOUGLAS R. HAYNIE
Counsel of Record
MELISSA P. HAISTEN
HAYNIE, LITCHFIELD & CRANE, P.C.
222 Washington Avenue
Marietta, Georgia 30060
(770) 422-8900

Counsel for Respondents

191429

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Does the State of Georgia's ban on the dissemination of sexual devices to adults violate petitioners' substantive due process rights as guaranteed by the Fourteenth Amendment of the United States Constitution and this Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)?

2. Does the City of Marietta's revocation of petitioners' business licenses because of petitioners' past sale of sexual devices to adults violate petitioners' rights to continue to disseminate non-obscene expressive works protected by the First and Fourteenth Amendments to the United States Constitution?

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Respondents, The City of Marietta, Bill Dunaway, in his official capacity as Mayor of the City of Marietta, Betty L. Hunter, Pete Waldrep, Johnny Sinclair, Andy Morris, Anthony Coleman, Jim King, and Philip Goldstein, in their official capacity as Members of the Marietta City Council, (hereinafter referred to as "Marietta"), respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the Superior Court of Cobb County of the State of Georgia in this case.

DENIAL OF EMERGENCY APPLICATION FOR STAY

On October 29, 2004, Petitioners filed an Emergency Application with the Court for a Stay of Enforcement of the judgment issued by the Supreme Court of Georgia and same was denied by Honorable Justice Kennedy on November 4, 2004. *See* Exhibit "A".

DISCUSSION OF FACTS AND COURSE OF PROCEEDINGS BELOW

The litigation between the City of Marietta and the adult entertainment clubs located within the City of Marietta, Georgia began in 1994 when the City of Marietta adopted an Adult Entertainment Ordinance. Following the adoption of the Ordinance, three adult entertainment clubs within the City of Marietta challenged the Ordinance adopted by the City, resulting in a decision by the Supreme Court of Georgia, *Goldrush II, et al. v. City of Marietta, et al.*, 267 Ga. 683, 482 S.E.2d 347 (1997), in which the Ordinance was upheld over challenges similar to those raised in the instant case. Thereafter, the owners applied for Certiorari in the United States Supreme Court, which was denied on October 6, 1997. *See* Exhibit "B".

The City of Marietta states to the Court that the business licenses in this case, unlike most cases, constitute a contract between the City of Marietta and Petitioners in that there are written and signed stipulations attached to the licenses. That is, Marietta insisted that Petitioners agree to certain written conditions and stipulations prior to the issuance of the licenses and such stipulations have been attached to the licenses and constitute a contract between Petitioners and the City of Marietta. The trial court specifically held that Petitioners violated stipulation number six through the commercial sale of items which constituted a public nuisance. It was not necessary for the court to hold the items obscene but only necessary for the court to hold that the sale of such items, in a commercial establishment, violated Paragraph Six of the signed written stipulations attached to the license. In addition, based upon the facts in the record, the trial court also held that the sale of such items violated stipulation number seven which prohibited the sale of any sexually oriented items in more than twenty percent (20%) of the floor space of the store. Factually, the trial court found that such items constituted forty-nine percent (49%) of the floor space of the premises. Based upon the factual findings in this case, it is not necessary for the Court to reach the constitutional issues due to the violation by Petitioners of the contract conditions between the parties.

In addition, litigation between the City of Marietta and the Applicant herein resulted in a decision by the Supreme Court of Georgia this summer. In that case, the City of Marietta obtained a temporary injunction requiring closure of the store for the sale of items which constituted a public nuisance. *See Inserection v. City of Marietta*, 278 Ga. 170, 598 S.E.2d 452 (June 7, 2004). Interestingly, Petitioners did not appeal the decision, therefore it is final. While the Georgia

Supreme Court dismissed the appeal based on mootness, Petitioners raised identical issues in the Georgia case that are being raised in this case.

The facts in this case have been reviewed by three reviewing courts and all three have denied relief to the Petitioners in this case. The Marietta City Council, following proper notice to the license holders, held a license revocation hearing. At the hearing, each license holder was represented by counsel, cross-examined all witnesses and was given a full and complete hearing on the matter. Following the hearing, the Marietta City Council unanimously voted to revoke the licenses. Thereafter, the full record in this case was reviewed by the following courts:

1. *Cobb County Superior Court.* Judge S. Lark Ingram reviewed the record and upheld the license revocations.

2. *Georgia Court of Appeals.* A three judge panel of the Georgia Court of Appeals reviewed the record in this transcript, and the same arguments raised by Petitioners here, and found no reversible error and no reason to disturb the judgment of the Superior Court of Cobb County.

3. *Supreme Court of Georgia.* The seven justices of the Supreme Court of Georgia reviewed the record in this case and found no reason to grant certiorari or a stay, and affirmed the license revocations in this case over the legal arguments which are identical to those raised by Petitioners herein.

FACTUAL ISSUES IN RECORD BELOW

I. Waiver By Contract

Being suspicious of the items which the Petitioners/ Licensees might be selling through their general merchandise license, the City of Marietta required the Petitioners to sign an agreement agreeing not to sell certain items. The agreement is attached to the license and incorporated by reference into the license. The two primary conditions at issue here are stated as follows:

6.

> Licensee agrees that it will not sell, display or have on the premises any instruments, devices, paraphernalia, products, article or articles which are designed, sold or viewed for use in connection with "specified sexual activities" as defined in the Marietta Adult Entertainment Code or which are sold or marketed primarily for stimulation of human genital organs.

7.

> Licensee agrees that it shall not:
>
> (a) Have twenty percent (20%) or more of its total retail floor space which is open to the public used for the sale of adult videos or other adult items defined in Section 8-20-020 of the Code of the City of Marietta.

(b) Derive more than twenty percent (20%) of its revenue from the sale of adult videos or other items defined in Section 8-20-020 of the Code of the City of Marietta, and

(c) Have more than twenty percent (20%) of its stock in trade diverted to adult videos or other items defined in Section 8-20-020 of the Code of the City of Marietta.

The City of Marietta has stated in each court that the signed license stipulations constitute a waiver by contract whereby the licensees, as a condition of the issuance of such license, waived the constitutional issues in this case and voluntarily agreed to the limitations set forth above. Not only did the licensees sign the conditions, the attorney for the licensees, Mr. Alan I. Begner, likewise signed and consented to the conditions.

II. Transcript Of Evidence

A transcript of evidence from the hearing was prepared based upon the license revocation heard by the Marietta City Council. Again, the attorney for the Petitioners/Licensees, Mr. Alan I. Begner, represented the Petitioners/Licensees at such hearing, cross-examined witnesses, was authorized to present evidence and argument and was granted a full due process hearing. A Superior Court judge and Georgia's two appellate courts have fully reviewed the transcript of evidence and found no deficiencies either in the process of the hearing or in the final judgment of the hearing.

III. Rule 15.2 Correction Of Facts

Petitioners state on pages 16 and 17 of their petition that there have been "alleged criminal violations" and "past violations of law" involved in this case. Such statements are factual inaccuracies as there have been no alleged criminal law violations at any level in this case nor were the Petitioners' business licenses revoked due to alleged criminal law violations.

REASONS FOR DENYING THE PETITION

I. *Lawrence v. Texas* Does Not Create A New Fundamental Liberty Interest.

Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472 (2003), does not create a new fundamental right to private sexual intimacy. The holding in *Lawrence* is only that substantive due process does not permit a state to impose a criminal prohibition on private consensual homosexual conduct. *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804, 815 (Jan. 28, 2004). As Justice Scalia points out in his dissent in *Lawrence*, nowhere in the majority opinion does the Court characterize the right to engage in homosexual sodomy as a fundamental right nor does it state that there is a right to private sexual intimacy. *Lawrence*, 539 U.S. at 586, 123 S. Ct. at 2488. The *Lofton* court stated that it is "particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental-rights analysis." *Lofton*, 358 F.3d at 816. The Court in *Lawrence* did not follow *Glucksberg* fundamental-rights analysis nor did it apply strict scrutiny, which is the proper standard when fundamental rights are implicated. Addressing the dissent in

Williams v. Attorney General of Alabama, 378 F.3d 1232, 1237 (11th Cir. July 28, 2004), the Eleventh Circuit states:

> It is telling that the best support for the fundamental-right-to-sexual-intimacy interpretation of *Lawrence* must be assembled from bits of dicta. It is equally telling the dissent cites no language from the opinion – much less language articulating a rule of law – that states with any precision the right that *Lawrence* purportedly held to exist, or the standard of review that it triggers.

The *Williams* court "decline[s] to extrapolate from *Lawrence* and its dicta a right to sexual privacy triggering strict scrutiny. To do so would be to impose a fundamental-rights interpretation on a decision that rested on rational-basis grounds, that never engaged in *Glucksberg* analysis, and that never invoked strict scrutiny." *Id.* 378 F.3d at 1238. Because of the importance and far-reaching impact of declaring a new fundamental right, as shown by the Supreme Court's application of the two-pronged test created in *Glucksberg*, its emphasis on strict scrutiny, and the necessity of specific, well-articulated analysis for courts to follow when it does create a significant precedent, it is clear that no such right was created by or intended by the Court in *Lawrence*, which did not attempt any of these procedures.

II. A Right To Private Sexual Intimacy Would Not Apply To Commercial Sales.

Even if there is some form of a right to sexual privacy created by *Lawrence*, such right does not apply to this case as the Georgia statute prohibits the sale or distribution of sexual devices and in no way addresses the use or possession of such items in a "dwelling or other private places." *Lawrence*, 539 U.S. at 562, 123 S. Ct. at 2475. The Court in *Lawrence* states:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.

Id. The above language emphasizes the liberty of persons in private and restricts the bounds of liberty to autonomy of self in freedom of thought, belief, expression, and certain intimate conduct. All of these are private, intangible attributes of humans that in no way relate to commerce or the sale or distribution of products. While such language defines liberty, it also restricts such liberty to a person's intangible freedoms. The Court in *Lawrence* further stresses the limited factual situation it was addressing in that case:

> The present case does not involve minors. It does not involve persons who might be injured or

> coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

Id. 539 U.S. at 578, 123 S. Ct. at 2484. In the present case however, more than just consenting adults in private are involved. Public conduct, minors, and those incapable of consent are involved in the public sale of sexual devices. There is "nothing 'private' or 'consensual' about the advertising and sale of a dildo. And such advertising and sale is just as likely to be exhibited to children as to consenting adults." *Williams*, 378 F.3d at 1238 n.8. *See also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61, 93 S. Ct. 2628, 2637 (1973) (holding that Georgia had a legitimate interest in regulating obscene material because the legislature "could legitimately act . . . to protect 'the social interest in order and morality'") (quoting *Roth v. United States*, 354 U.S. 476, 485, 77 S. Ct. 1304, 1309 (1957)).

Moreover, even if there is a fundamental right to sexual privacy, which is not supported by the cases cited by Petitioners, there is a compelling state interest in shielding the public from inadvertent exposure to the intimacies of others and of protecting minors and others legally incapable of consent from sexual abuse. While non-commercial acts may be entitled to a right of privacy, commercial acts have never been entitled to such a right. *See Morrison v. State*, 272 Ga. 129, 526 S.E.2d 336 (2000). Such a right to sexual

privacy does not relate to or infer a corresponding right to the commercial sale of sexual devices at a business premises which is open to the public. Petitioners in this case have cited no reported, un-reversed opinion supporting their argument that there is a constitutionally protected right to commercially distribute items which constitute either a nuisance or the distribution of obscene material. As seen in *Williams* and *Lawrence*, there is no such constitutional right.

III. This Case Does Not Merit An Expansion Of This Court's Ruling In *Lawrence v. Texas*

The case relied upon by Petitioners is inapposite to the circumstances presented in the present action. That is, the ruling in *Lawrence v. Texas* is concerned with the protection of private conduct, not commercial conduct. The Georgia courts have recognized a bright line difference between protection of private and commercial conduct. In *Morrison v. State*, 272 Ga. at 130, 526 S.E.2d at 337, the Supreme Court of Georgia concluded the "right of privacy conferred by our state constitution, like that in the federal constitution, does not extend to commercial sexual activity." It stated:

> Devices within the definition of O.C.G.A. § 16-12-80(c) "are obscene as a matter of law." *Sewell v. State*, [238 Ga. 495], 496(5), 233 S.E.2d 187 (1977). In *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 128, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973), the Supreme Court of the United States specifically stated "that the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others. [Cits.]" Although *Powell* [*Powell v.*

> *State*, 270 Ga. 327, 510 S.E.2d 18 (1998)] held that Georgia's right to privacy is broader than the federal right, " 'it is not so broad that a person can take it with him to the store in order to purchase obscene material – even though he has the right to possess such material in the privacy of his home.' [Cits.]" *Stall v. State*, 570 So.2d 257, 262 (Fla. 1990) (construing the Florida constitutional right of privacy). Thus, *Powell* does not confer upon Morrison the constitutional right to distribute obscene material.

Morrison, 272 Ga. at 130, 526 S.E.2d at 337. The right to possess obscene material within the privacy of an individual's home is patently distinct from the rights associated with distributing and selling such items to the public in a commercial setting.

While neither *Lawrence v. Texas* nor the due process clause establish that the present case was incorrectly decided, Petitioners specifically agreed not to sell sexual devices as part of their business licenses. Though Petitioners would like for this Court to expand its ruling in *Lawrence v. Texas*, the waiver by contract shown in this record does not warrant such a holding.

IV. The Court Should Decline to Grant Review of This Case Because This Case Presents No Conflict with Any Decision Of This Court, the Eleventh Circuit Court or the Georgia Appellate Courts.

The Superior Court applied the correct standard in determining that the "sex toys and other evidence in this case constitute an obscenity under O.C.G.A. § 16-12-80(c) and that the sale of such items is unlawful under O.C.G.A. § 16-12-80." (Petitioners' Appendix 10a, 20a) Its decision that sexual devices within the definition of O.C.G.A. § 16-12-80(c) are obscene as a matter of law is consistent not only with established precedent in the Georgia appellate courts, *see Morrison*, *supra*; *Chamblee Visuals, LLC v. City of Chamblee*, 270 Ga. 33, 506 S.E.2d 113 (1998); *Paperback Book Mart, Inc. v. State*, 148 Ga. App. 377, 251 S.E.2d 396 (1978); *Sewell v. State*, 238 Ga. 495, 233 S.E.2d 187 (1977), but also with the decisions of the Eleventh Circuit Court of Appeals, *see Williams*, *supra*; *Lofton*, *supra*, and the decisions of this Court. *See 12 200-Foot Reels of Super 8mm. Film*, *supra*; *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 91 S. Ct. 1400 (1971); *United States v. Reidel*, 402 U.S. 351, 91 S. Ct. 1410 (1971).

Following the analysis in *Sewell v. State* that "[i]t has been held many times by both this court and the United States Supreme Court that obscene material does not come within the protection of the First Amendment," *Sewell*, 238 Ga. at 496, 233 S.E.2d at 189, the court in *Chamblee Visuals* states that the "constitutional propriety of O.C.G.A. § 16-12-80(c) is, therefore, clear." *Chamblee Visuals*, 270 Ga. at 34, 506 S.E.2d at 115. In their decisions the Georgia appellate courts have followed the consistent line of United States Supreme Court cases that indicate "that the protected right to possess

obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others." *12 200-Foot Reels of Super 8 mm. Film*, 413 U.S. at 128, 93 S.Ct. at 2669. *See also Thirty-Seven (37) Photographs, supra*; *Reidel, supra*. Also remaining consistent with United States Supreme Court decisions are recent cases in the Eleventh Circuit. Both *Lofton* and *Williams*, the controlling authority in the Eleventh Circuit on the issue, conclude that *Lawrence v. Texas* does not create a new fundamental right to private sexual intimacy. Further, *Williams*, which upholds the constitutionality of an Alabama statute prohibiting the commercial distribution of any device primarily used for stimulation of human genitals, states that there is "nothing 'private' or consensual' about the advertising and sale of a dildo." *Williams*, 378 F.3d at 1238 n.8.

While the Eleventh Circuit and the dissent in *Lawrence* have determined that the *Lawrence* decision does not create a new fundamental right, the Superior Court of Cobb County, the Georgia appellate courts, the Eleventh Circuit Court of Appeals and this Court have all specifically held that there is no right to sale or distribute obscene material. Because the main case that Petitioners rely on, *Lawrence*, does not create a new fundamental right to private sexual intimacy, as discussed above, and even if it did there is "nothing 'private' or 'consensual' about the advertising and sale of a dildo," Petitioners have no support for their assertion that the Georgia statute violates their substantive due process rights. *Id.* Petitioners writ of certiorari should be denied because this case presents no conflict with any decision of this Court or any other court.

V. It Is Not Necessary To Reach The Constitutional Issues In This Case.

No constitutional issues were ever ruled on or addressed by any lower court in this case. As evidenced in the Discussion of Facts and Course of Proceedings Below and the Factual Issues in Record Below sections of this Brief in Opposition, this case has been decided on the facts, that the Petitioners expressly violated written, signed contracts in which they agreed to not sell items "sold or marketed primarily for stimulation of human genital organs." (Petitioners' Appendix, 69a, 78a) Further, the Superior Court in this case and the Supreme Court of Georgia in *Inserection v. City of Marietta*, 278 Ga. 170, 598 S.E.2d 452 (June 7, 2004), which did not reach any constitutional issues, found that the appeals of Petitioners are moot due to the expiration of the business licenses. Since no lower court ruled on anything other than the facts in this case, it is not necessary for this Court to reach the constitutional issues in this case. Because there are no constitutional issues or questions of federal law pending in this case, Petitioners' writ of certiorari should be denied.

VI. Petitioners' Licenses Were Revoked Due To Contract Violations

In their second point Petitioners discuss "past, alleged criminal law violations" and "past obscenity convictions" which would constitute a "classic prior restraint." (Petition 16-17) Stating that there have been "past, alleged criminal law violations" in this case and referring to "past obscenity convictions" are factual inaccuracies. *Id.* There have been no alleged criminal law violations at any level in this case nor were the Petitioners' business licenses revoked due to

alleged criminal law violations or past obscenity convictions. The licenses were revoked based on the facts in the record, more particularly, that the Petitioners violated written, signed stipulations which were part of the licenses and to which Petitioners agreed. A violation of such stipulations constitutes a breach of contract and violation of the business licenses. In no way does such a breach of contract relate to the prior restraint of future lawful expression and the First Amendment. Because there are no such constitutional issues in this case, the request for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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Counsel for Respondents

EXHIBITS

EXHIBIT A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

November 4, 2004

Mr. Douglas R. Haynie
222 Washington Avenue
Marietta, GA 30060

Re: 1690 Cobb L.L.C, d/b/a/ Waterpipe World, Inserection, A Fantasy Store, and Erik Clabaugh v. City of Marietta, Georgia, et al.
Application No. 04A381

Dear Mr. Haynie:

The application for a stay of enforcement of judgment pending the filing and disposition of a petition for writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on November 4, 2004 denied the application.

Exhibit A

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by s/ Troy D. Cahill
Troy D. Cahill
Staff Attorney

EXHIBIT B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 6, 1997

Mr. Douglas R. Haynie
Haynie & Litchfield
222 Washington Avenue
Marietta, GA 30060-1993

Re: Mukesh Shretta and Gold Rush, III, Inc., dba Club Taj Mahal v. City of Marietta, et al.
No. 96-1970
Varsalona's Italian Restaurant, dba Boomer's, et al. v. City of Marietta, et al.
No. 96-2035

Dear Mr. Haynie:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is denied.

Sincerely,

s/ William K. Suter
William K. Suter, Clerk

(4)

No. 04-640

Supreme Court, U.S.
FILED
JAN 3 - 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

1690 COBB L.L.C. d/b/a WATERPIPE WORLD, and ERIK CLABAUGH

and

INSERECTION, A FANTASY STORE, and ERIK CLABAUGH,

Petitioners,

v.

THE CITY OF MARIETTA, BILL DUNAWAY, In his official capacity as Mayor of THE CITY OF MARIETTA, BETTY L. HUNTER, PETE WALDREP, JOHNNY SINCLAIR, ANDY MORRIS, ANTHONY COLEMAN, JIM KING, And PHILIP GOLDSTEIN, In their official capacity as Members of THE MARIETTA CITY COUNCIL

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Petitioners submit this reply brief to counter certain factual errors set forth in respondents' Brief in Opposition. On the basis of a faulty representation of the proceedings below, respondents would have this Court deny the requested writ of certiorari to the Supreme Court of Georgia, thereby depriving petitioners of an opportunity to convince the Court on the merits that its decision in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003), means that the State of Georgia's ban on the dissemination of sexual devices to adults violates petitioners' substantive due process rights as guaranteed by the Fourteenth Amendment of the United States Constitution. A correct view of the pertinent facts reveals that this is a procedurally and substantively appropriate case for the Court's determination of this important national issue.

RESPONDENTS' FACTUAL MISREPRESENTATIONS

I. Respondents Err in Describing the Fact Basis of the Cobb County Superior Court's Affirmance of the City of Marietta's Revocation of Petitioners' Business Licenses.

Without citing the appendix or offering any additional documentary support for their claims, respondents contend that the Cobb County Superior Court (Ingram, J.) made factual findings in denying petitioners' Petition for a Writ of Mandamus and Writ of Certiorari that provide grounds that would allow this Court to avoid reaching the constitutional issues presented on the instant petition. See page 2 of

respondents' Brief on Appeal. Review of Judge Ingram's decision, however, establishes that the Superior Court did not base its decision on the grounds claimed by respondents.

First, the Superior Court did not affirm the City of Marietta's revocation of petitioners' business licenses on the ground that petitioners sold items that constituted a public nuisance. Moreover, the Superior Court did not make factual findings with respect to how much of petitioners' floor space was used for the sale of sexually oriented items.

Rather, the Superior Court rejected petitioners' various federal and state constitutional challenges—including a violation of petitioners' substantive due process rights to privacy and liberty under the Fourteenth Amendment and *Lawrence v. Texas, supra* (A 30-31, 49-50), on three precise grounds:

1. The sex toys and other evidence in this case violate the written conditions of the license;

2. The sex toys and other evidence in this case violate the adult entertainment code of the City of Marietta as referenced in the license; and

> 3. The sex toys and other evidence in this case constitute an obscenity under O.C.G.A. § 16-12-80(c) and that the sale of such items is unlawful under O.C.G.A. § 16-12-80.

(A 9-10).

Thus, it is indisputable that petitioners' substantive due process challenge to the State of Georgia's ban on the dissemination of sexual devices to adults was the central dispute in the state courts below, and there is no non-constitutional reason justifying avoidance of the important privacy rights question put squarely to this Court by petitioners.

II. Respondents' Erroneously Represent that there are No Constitutional Issues or Questions of Federal Law Pending in this Case.

Citing the Georgia Supreme Court's decision that petitioner Inserection, A Fantasy Store's interlocutory appeal from the granting of a temporary injunction against it in a separate case was moot, respondents contend that, consequently, there are no constitutional issues or questions of federal law pending in this case. Respondents' argument is without basis in law or fact.

In *Inserection v. City of Marietta*, 278 Ga. 170, 598 S.E.2d 452 (2004), the Georgia Supreme Court ruled that Inserection's interlocutory appeal from the order of the Cobb County Superior Court granting a temporary injunction against its operation during a separate lawsuit brought by the City to permanently enjoin the

store's operation was moot because the store's business license had expired during the course of the litigation. *Id.* at 171, 598 S.E.2d 452. This interlocutory appeal is entirely distinct from petitioners' later filed Petitions for Writ of Mandamus and Writ of Certiorari (A 24-33, 43-51), which are the subjects of the petition currently before the Court. Since the decisions of the Cobb County Superior Court that petitioners ask this Court to review directly addressed and rejected the constitutional arguments raised in this petition for a writ of certiorari to the Supreme Court of Georgia, there can be no dispute that petitioners' claims are live—particularly the central contention that Georgia's ban on the dissemination of sexual devices violates the Due Process Clause of the Fourteenth Amendment.

III. Respondent's Improperly Assert Rule 15.2 to Suggest Petitioners Set Forth Incorrect Facts.

At page 6 of their Brief in Opposition, respondents' misrepresent to the Court that petitioners' contention that this case involves "alleged criminal violations" and "past violations of law," is untrue. Respondents assert that petitioners' statements "are factual inaccuracies as there have been no alleged criminal law violations at any level in this case nor were the Petitioners' business licenses revoked due to alleged criminal law violations." Respondents' claims are patently untrue.

Review of the appendix submitted to this Court unequivocally demonstrates that petitioners' description of the state of facts below was entirely accurate. For instance, the City of Marietta revoked the business

license of petitioner Inserection Water Pipe World in a letter dated June 23, 2003, that can be found at pages 36-39 of the appendix. Quite contrary to respondents' claim of error, the City's business license manager found that petitioner's sale of sexual devices violated the ordinances of Marietta and, further, "that the evidence and the sale of the items introduced into evidence upon and within the licensed premises constitute a violation of the criminal laws of the State of Georgia, including O.C.G.A. § 16-12-80(c)" (A 38-39). Identical findings are set forth in the license revocation letter sent to petitioner Inserection A Fantasy Store (A 57).

Accordingly, respondents cannot reasonably contend that this case does not involve the alleged violations of law—particularly of the Georgia sexual device ban—that inarguably lie at the heart of this case. It is not entirely clear why respondents would maintain a contrary position, but if their intention was to suggest a jurisdictional deficiency, such an assertion is readily disproved by the record documents set forth in the appendix.

REASONS FOR GRANTING THE PETITION

I. The City of Marietta Cannot Lawfully Condition the Issuance of Business Licenses on Compliance with Restrictions that Violate Petitioners' Constitutional Rights.

In their Brief in Opposition, respondents repeatedly argue that no constitutional issues are presented on this petition merely because the City refused to issue business licenses to petitioners unless

they agreed to comply with the requirement that the stores refrain from selling sexual devices (see Brief in Opposition at pp. 4-5, 14-15). Respondents characterize this as "waiver by contract." Petitioners call it holding constitutional rights hostage to illicit government intentions.

Government officials cannot limit the enjoyment of federal constitutional rights by the imposition of unconstitutional conditions. See, e.g., *Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 674-75, 116 S. Ct. 2342 (1996). The imposition of an unconstitutional condition that requires a licensee to abandon privacy and liberty rights guaranteed by the Due Process Clause of the Fourteenth Amendment in order to do business in the City of Marietta is condemnable in every respect. The mere fact that respondents believe they have the power as government officials to force petitioners to give up certain of their civil rights in order to do business in Marietta is reason enough to grant the writ of certiorari sought by petitioners.

II. *Lawrence v. Texas* Requires that Georgia's Ban on the Dissemination of Sexual Devices Be Struck Down on the Ground that the Prohibition Violates the Guarantees of the Substantive Due Process Clause of the Fourteenth Amendment.

Despite even the acknowledgment of Justice Scalia that the majority in *Lawrence v. Texas* had interpreted the Due Process Clause to provide for a level of personal privacy with respect to sexual issues that

"effectively decrees the end to all morals legislation," *Id.* at 599, 123 S. Ct. 2472, respondents maintain that this important decision did not create recognize such a fundamental liberty interest. Petitioners respectfully submit that respondents' argument conveniently ignores the Court's powerful language declaring a limitation on the State's interference with a whole range of personal decisions, including those involving concerns outside the home: "And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Lawrence v. Texas,* 539 U.S. at 562, 123 S. Ct. 2472. In reliance on the Eleventh Circuit's decision in *Williams v. Attorney General of Alabama,* 378 F.3d 1232 (2004), respondents dismiss the *Lawrence* Court's enunciation of an expansive privacy right favoring personal choice, particularly in sexual matters, simply because the Court's constitutional rights analysis in *Lawrence v. Texas* did not follow an evaluative path that the Eleventh Circuit prefers. Notably, respondents avoid confronting the actual language used by the majority in *Lawrence v. Texas, supra,* seeking refuge from the obvious import of the *Lawrence* Court's recognition of substantive due process privacy protections by focusing instead on analytical process criticisms that ignore the magnitude of the majority's ruling.

Because *Williams* was wrongly decided by virtue of the Eleventh Circuit's unwarranted focus on particular sex acts instead of the larger question decided by *Lawrence v. Texas*—the right of Americans to be left

alone when it comes to what goes on in their bedrooms—respondents' reliance on the decision similarly misses the mark. Indeed, the potential that the *Williams* analysis may undermine the true intent of this Court in *Lawrence v. Texas, supra,* provides an additional reason to grant the writ of certiorari requested by petitioners.

Furthermore, respondents' assertion that, even if the Due Process Law guarantees a right of sexual privacy, the State of Georgia may still ban petitioners' dissemination of sexual devices that citizens are permitted to individually possess, is inherently flawed. As this Court pointed out in *Carey v. Population Services,* 431 U.S. 678, 97 S. Ct. 2010 (1977), prohibiting the commercial distribution of items Americans may lawfully possess is simply another form of a ban:

> Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions. A total prohibition against sale of contraceptives, for example, would intrude upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use.

Id. at 687-88, 97 S. Ct. 2010 (citation omitted).

Similarly, in the instant case Georgia's prohibition of sales of sexual devices to consenting adults for use in private is as harsh as a direct ban on their possession and use. Moreover, as the *Carey* Court also recognized, a ban on dissemination of an item may actually be easier

to enforce than a prohibition of personal possession and use, thereby even more assuredly limiting or eliminating the personal right. Such a result simply cannot be countenanced by this Court in light of *Lawrence v. Texas*.

CONCLUSION

Petitioners respectfully submit that the Court should grant their petition for a writ of certiorari to the Supreme Court of Georgia so that they may have a full and fair opportunity to vindicate their rights to privacy and liberty under the First and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

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